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IN THE

Supreme Court of the United States

October Term 1976

No. 76-385

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

JOHN R. HUPPER,
W. DENNIS CROSS,
One Chase Manhattan Plaza,
New York, N. Y. 10005

JOHN D. ROBB,
20 First Plaza,
Albuquerque, New Mexico 87103

DANIEL K. MAYERS,
ROBERT B. MCCAW,
1666 K Street, N.W.,
Washington, D. C. 20006
Attorneys for Petitioner

Of Counsel:

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005

RODEY, DICKASON, SLOAN, AKIN & ROBB,
20 First Plaza,
Albuquerque, New Mexico 87103

WILMER, CUTLER & PICKERING,
1666 K Street, N.W.
Washington, D. C. 20006

September 14, 1976

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

Opinions and Orders Below

Petitioner General Atomic Company ("GAC") seeks writs of certiorari directed (a) to the District Court of the First Judicial District, County of Santa Fe, New Mexico (the "Santa Fe Court"), to review its order of injunction

dated April 2, 1976 (the "Injunction"), and (b) to the New Mexico Supreme Court to review its order dated June 16, 1976, in which that Court quashed as improvidently granted an alternative (temporary) writ of prohibition directed to the Santa Fe Court, thereby leaving the Injunction in effect.

The Injunction prevents petitioner from exercising rights granted by the federal Constitution, federal statutes and the Federal Rules of Civil Procedure:

> "General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto."

The Injunction thus clearly prevents petitioner from prosecuting in any forum, including the federal courts, any claim petitioner may have against United Nuclear Corporation ("UNC") relating to the subject matter of a pending *in personam* action brought by UNC against petitioner in the Santa Fe Court. UNC seeks in that court to avoid contract obligations to deliver over 24,000,000 pounds of uranium having a present market value of approximately a billion dollars. The Injunction extends to an on-going federal proceeding in which petitioner previously had been made a party defendant by Indiana & Michigan Electric Company ("I&M") a public utility demanding delivery by petitioner of a substantial portion of that uranium, and

prevents petitioner from protecting itself as a defendant in the federal court through exercise of its rights to seek impleader or joinder of UNC under Fed. R. Civ. P. 14 or 19(a) in order to force UNC to deliver such uranium to petitioner.

The Injunction of the Santa Fe Court is annexed hereto as Appendix A. That court's reasons for granting the Injunction were set forth in a letter to the parties dated March 29, 1976, annexed hereto as Appendix B. On petitioner's application, the New Mexico Supreme Court issued an alternative writ of prohibition dated April 14, 1976, annexed hereto as Appendix C. The writ of prohibition had the effect of bringing the Injunction before the New Mexico Supreme Court for review of petitioner's claims that it was illegally issued, including the constitutional and other federal claims advanced in this Petition. On June 16, 1976, after briefing and immediately after oral argument, the New Mexico Supreme Court issued an order quashing the alternative writ of prohibition "as improvidently granted", leaving the Injunction in effect. That order is annexed hereto as Appendix D. Because no opinion was issued by the New Mexico Supreme Court, its reasons can best be ascertained from comments by the Court during oral argument. Relevant excerpts of a transcript of that argument are annexed hereto as Appendix E.*

Jurisdiction

The order of the New Mexico Supreme Court was entered on June 16, 1976. This Court has jurisdiction to issue a writ of certiorari under 28 U.S.C. § 1257(3).

The New Mexico Supreme Court reviewed the Injunction under a writ of prohibition. Under New Mexico law,

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* No official transcript was made. Appendix E was transcribed from a tape recording made by the Clerk of the Supreme Court.

a writ of prohibition issues "to prevent . . . [an inferior court] from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction". *State ex rel. Harvey* v. *Medler,* 19 N.M. 252, 142 P. 376 (1914). The writ was issued on April 14, 1976, and prohibited the trial judge "from taking any action to enforce the . . . [Injunction] until the further order of this Court" and ordered him "to show cause . . . why you should not be so prohibited and restrained and further to show cause why this alternative writ herein issued should not be made permanent." * The order quashing that writ "as improvidently granted" was a final determination by the New Mexico Supreme Court, the court of last resort of the State, of the merits of petitioner's claim that the trial court had gone "beyond its legitimate powers" in issuing the Injunction.

The New Mexico Supreme Court considered and rejected petitioner's constitutional claims in reaching its decision. Before both the trial court and the New Mexico Supreme Court, petitioner contended that the federal Constution and statutes barred granting the Injunction, on the grounds set forth in this Petition. That contention was explicitly rejected by the trial court (Appendix B). Although the New Mexico Supreme Court issued no opinion, the briefs and arguments of the parties, as well as the remarks of counsel and the Court during oral argument (Appendix E), show that petitioner's constitutional claims were vigorously presented to, and considered by, the New Mexico Supreme Court.

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* It should be noted that, while the alternative writ prohibited the trial judge from taking any action to enforce the Injunction, it did not stay the Injunction's effectiveness. Thus, had petitioner taken any action against UNC after issuance of the writ, it would have been subject to retroactive sanctions for violating the Injunction once the writ was quashed.

It thus appears that the order of the New Mexico Supreme Court quashing the alternative writ "as improvidently granted" was grounded on rejection of the merits of petitioner's claim. For that reason petitioner seeks a writ of certiorari directed to the New Mexico Supreme Court. If the order was not so grounded, it was the equivalent of a refusal to hear a discretionary appeal. In that case, the decision of the Santa Fe District Court granting the Injunction was by "the highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257. Petitioner therefore also seeks a writ of certiorari directed to that court.

The Injunction is a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. The questions presented by this petition are wholly separate from and independent of the merits of the state court action in which the Injunction was issued, and review of a final judgment in that action would not provide an opportunity for petitioner to obtain review of the Injunction. See *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). The Injunction would not be merged in such final judgment. Moreover, the injury petitioner seeks to avoid will already have been inflicted, since such judgment would, absent the most extraordinary circumstances, be determinative of petitioner's substantive rights in other litigation which it has been restrained from pursuing. See *Local No. 438* v. *Curry,* 371 U.S. 542 (1963).

Questions Presented

1. Can a state court in an *in personam* action constitutionally enjoin a defendant, also a defendant in a pending federal court action instituted by a different plaintiff, from impleading or moving to join pursuant to Fed. R. Civ. P. 14 or 19(a) the state court plaintiff as a party in such federal action?

2. Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are U.S. Const. Art. III, § 1, U.S. Const. Art. VI and 28 U.S.C. § 2072, which provide in relevant part:

U.S. Const. Art. III, § 1:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . ."

U.S. Const. Art. VI:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

28 U.S.C. § 2072:

> "The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts and courts of appeals in civil actions. . . ."

Also involved are Fed. R. Civ. P. 14(a) and 19(a), which provide in relevant part:

Fed. R. Civ. P. 14(a):

> "When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

Fed. R. Civ. P. 19(a):

> "Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

Statement

Background

The action below is one of several lawsuits arising from five long-term contracts for supply of uranium and uranium fuel assemblies entered into between UNC and each of four utilities during the period 1967-1971 (the utility contracts). In a series of agreements in 1971, UNC assigned those contracts to petitioner's predecessor Gulf United Nuclear

Fuels Corporation ("GUNFC"), a corporation formed by Gulf Oil Corporation ("Gulf") and UNC. On the occasion of the assignments, UNC guaranteed GUNFC's performance of all the utility contracts and UNC remained obligated to the utilities on three of the five contracts to supply the uranium required to perform those contracts. UNC also entered into a Uranium Supply Agreement with GUNFC which obligated UNC to supply to GUNFC the required uranium. In 1973, Gulf bought out UNC's interest in GUNFC. In connection with the buy-out the parties entered into a revised Uranium Supply Agreement, providing that:

> "UNC shall sell to the Corporation [GUNFC, now General Atomic] and the Corporation shall purchase from UNC all the Concentrates (including those concentrates to be used in reload fuel assemblies to be fabricated by the Corporation) which the Corporation is required to supply pursuant to the . . . [utility contracts]. . . . The Concentrates . . . shall be provided in accordance with the terms and conditions, including price, of the applicable [utility contract], as required by the buyer and as specified in this Agreement."

Thereafter Gulf entered into a partnership with Scallop Nuclear, Inc., whereby the two companies formed petitioner, General Atomic Company. Gulf assigned its rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts to petitioner.

From 1967 to mid-1973, the market price of uranium remained relatively stable at about $7 per pound, and the contracts for the most part call for delivery of uranium at about that price (subject to limited escalation). Since the latter part of 1973, the market price of uranium has advanced dramatically, and is now some $40 per pound. The difference between contract price and market price for the uranium remaining to be delivered by UNC to petitioner under the 1973 Uranium Supply Agreement is in excess of $600,000,000.

The New Mexico State Court Action

Seeking to avoid continued performance of its obligation to supply uranium to GAC at the contract prices, UNC stopped delivery in 1975 and commenced a declaratory judgment action against petitioner and its constituent partners individually in the District Court for the First Judicial District, County of Santa Fe, New Mexico, on August 8, 1975, alleging among other things mutual mistake, breach and commercial impracticability. After Gulf, which is of diverse citizenship to UNC, removed the entire case to the United States District Court for the District of New Mexico under 28 U.S.C. § 1441(c), UNC on December 31, 1975, took a voluntary non-suit as of right pursuant to Fed. R. Civ. P. 41 (a) (1) (i). The same day UNC instituted the instant action, which is virtually identical to the previous action except that it names only petitioner as a defendant. Inasmuch as both UNC and Scallop Nuclear, the other partner of petitioner, are Delaware corporations, petitioner was unable to remove.* UNC's obvious purpose for this maneuver was to keep the action in state court.**

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* In its original complaint, UNC had also alleged fraud and breach of fiduciary duty by Gulf in connection with the formation, operation and dissolution of GUNFC and the procurement of a release from UNC of its claims against Gulf in connection with Gulf's buy-out of UNC's interest in GUNFC in 1973. After UNC brought the instant action without naming Gulf individually as a defendant, Gulf filed an action on January 23, 1976, in the United States District Court in Albuquerque, New Mexico, for a declaratory judgment that the release was valid.

** The desire of UNC, a substantial New Mexico employer, to have its controversies with GAC and I&M resolved in courts within the State is understandable. But that does not explain why UNC took a non-suit and dropped a party in order to prevent removal to the Federal District Court in New Mexico.

On May 18, 1976, after issuance of the alternative writ of prohibition and shortly before oral argument before the New Mexico Supreme Court on the permanent writ, it was reported that Justice Donnan Stephenson of that Court intended to resign from the Court

The New York Federal Court Action

On February 24, 1976, Indiana & Michigan Electric Company ("I&M"), one of the utilities with which UNC had originally contracted for the supply of uranium and uranium fuel assemblies, commenced an action against petitioner in the United States District Court for the Southern District of New York, seeking specific performance, damages and declaratory relief for petitioner's alleged failure to make deliveries to I&M. I&M did not name UNC as a defendant, although UNC remained liable on its original contract with I&M, had guaranteed performance thereof, was of diverse citizenship to UNC, and was clearly subject to suit in that District.

Issuance of the Injunction

Shortly thereafter, on March 15, 1976, anticipating that petitioner would implead it in the New York federal action pursuant to Fed. R. Civ. P. 14(a),* UNC applied for and

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as of June 30, 1976, to join the firm representing UNC. It was noted that, while Justice Stephenson "had not committed himself to any particular litigation", the move would leave him "free to participate in what could be the largest civil suit, money-wise, pending in the world". *Albuquerque Journal,* May 18, 1976, p. 1. Since his resignation Mr. Stephenson has in fact taken an active role in the case.

* Petitioner had already indicated its desire to have the entire controversy determined in a single forum by filing on January 19, 1976, a complaint in interpleader and in the nature of interpleader pursuant to 28 U.S.C. § 1335 in the United States District Court in Albuquerque, New Mexico. The complaint named as defendants UNC, I&M and the three other utilities whose contracts with UNC were assigned to petitioner's predecessor. Petitioner sought determinations binding on all parties as to its respective rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts. On March 2, 1976, the Court granted the defendants' motions to dismiss the action on the ground that subject matter jurisdiction under the interpleader statute was lacking. Petitioner's appeal is now pending in the United States Court of Appeals for the Tenth Circuit.

On September 9, 1976, in a further effort to find a federal forum where both I&M and UNC are parties, GAC moved pursuant to Fed.

obtained *ex parte* from the Santa Fe Court a temporary restraining order restraining petitioner and its constituent partners from "instituting suit or filing a third party complaint against United Nuclear."* After hearing, the Santa Fe Court on April 2, 1976, issued the Injunction.**

Petitioner promptly sought, and obtained on April 14, 1976, an alternative writ of prohibition from the New Mexico Supreme Court prohibiting the trial court "from taking any action to enforce . . . [the Injunction] until the further order of this Court". After briefing and argument, the Supreme Court quashed the writ "as improvidently granted".

Reasons for Granting the Writ

In square conflict with this Court's holding in *Donovan* v. *Dallas,* 377 U.S. 408 (1964), the state courts of New Mexico have claimed the power to enjoin *in personam* federal proceedings. By so doing, they have posed a direct chal-

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R. Civ. P. 24 to intervene in an action brought in August 1975 by UNC against I&M in a different New Mexico state court and thereafter removed by I&M to the federal District Court in Albuquerque. *UNC* v. *I&M,* Civil No. 75-561 (D.N. Mex.). This action has, since April 1976, been indefinitely stayed pursuant to stipulation of those parties while each has pursued in separate courts (in Santa Fe and New York) its claims against GAC. Whether such intervention will be permitted is not presently known. In any event, the Injunction prevents GAC from asserting any claim against UNC in that action as well.

* At the court's suggestion UNC agreed that it should similarly be enjoined.

** The Gulf declaratory judgment action, discussed in the footnote at p. 9, *supra,* and the interpleader action, discussed in the footnote at p. 10, *supra,* were exempted from the Injunction on the ground that those actions were already pending when the Injunction was sought. No such exemption was made for the New York federal court action initiated by I&M although it was also then pending.

lenge to federal supremacy and raised a question of the gravest importance to the federal system.

The decisions of the New Mexico courts granting and upholding the Injunction took place in the context of an *in personam* action brought by a Delaware plaintiff in New Mexico state court against non-New Mexico defendants, and kept in the state court by the expedient of dropping the non-Delaware defendant from the original action. They took place in the context of an action just begun, even before joinder of issue. The effect of the New Mexico decisions has been to render petitioner helpless fully to defend itself in a federal lawsuit in which it is an unwilling defendant. In light of all the circumstances, it is clear that the Injunction is nothing more nor less than a usurpation by the state courts of power specifically granted to the federal courts by Congress and an unconstitutional abridgement of a federal court defendant's right to assert a complete defense.

1. *The Injunction Unconstitutionally Interferes With The Federally Granted Rights of Petitioner As A Litigant In An Ongoing Federal Proceeding.* In *Donovan,* this Court held that "state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here". 377 U.S. at 413. As shown in Point 2, *infra,* we believe that this principle renders the Injunction unconstitutional in its entirety as it applies to *in personam* federal court actions. The Injunction's most outrageous aspect, however, lies in its interference with an ongoing federal court action. In *Donovan* this Court held that state courts were without power to require a plaintiff to abandon a suit *in personam* brought in federal court where there is concurrent jurisdiction, even after a final state court judgment. *A fortiori,* then, state courts are without

power to circumscribe the claims or defenses which a defendant can assert in federal court before the state court case has even been tried. Unfortunately, however, the New Mexico state courts have failed to conform to this clear constitutional limitation. By this Injunction the New Mexico state courts have arrogated to themselves the power to limit petitioner's federal rights, as a defendant in the previously pending New York federal action, to invoke the full range of remedies that Congress and this Court, through the Federal Rules of Civil Procedure, have authorized every federal litigant to utilize in the prosecution or defense of its case.

There can be no question of petitioner's right, absent the Injunction, to implead UNC as a person "who is or may be liable to [petitioner] for all or part of the plaintiff's claim against him" in that action. Such impleader would, as intended by Fed. R. Civ. P. 14(a), afford petitioner the opportunity, if it is ordered to deliver uranium to I&M or to pay damages to I&M, to obtain in the same case a judgment against UNC compelling UNC to deliver such uranium to it or to indemnify it for the damages assessed.

In addition, there are basic common, indeed identical, questions underlying petitioner's disputes with UNC and with I&M. The 1973 Uranium Supply Agreement incorporates much of the UNC-I&M 1967 contract by reference and, at least according to UNC (in its pleadings below),* conditions UNC's obligation to deliver uranium to petitioner on petitioner's legal obligation to deliver to I&M under such contract. UNC has raised a host of alleged defenses to delivery under that contract, both in the action below and in litigation directly with I&M.** Indeed, UNC

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* Complaint in *UNC* v. *GAC,* pp. 18-19, 22-23.

** *UNC* v. *I&M,* Civil No. 75-561 (D.N. Mex.).

has asserted that it need not deliver to petitioner because petitioner need not deliver to I&M. Without UNC joined in the I&M action, the federal court might find that petitioner is obligated to deliver uranium to I&M, while the New Mexico state court, viewing identical contract provisions and other questions differently, could find that UNC is not obligated to deliver to petitioner, on the ground that petitioner is not obligated to deliver to I&M. Such a risk of inconsistent adjudications concerning identical issues highlights the prejudice to petitioner resulting from the Injunction.

The Injunction, and petitioner's consequent inability to join or implead UNC in the federal action,* operates to frustrate the intent of the Federal Rules to prevent inconsistent adjudication on issues common both to the claim of the utilities against petitioner and to petitioner's claims over against UNC. It deprives petitioner of its ultimate defensive position, that if it is found liable, UNC must be liable over to it. Additionally, it deprives petitioner of important practical benefits to which it is entitled under the Federal Rules. For example, the Injunction deprives petitioner of the broader discovery rights available against parties to an action (*e.g.*, Fed.R.Civ.P. 26, 33, 34, 35, 37). It may well deprive petitioner of the oral testimony of UNC at the trial since, if UNC is not a party, its witnesses beyond subpoena range may perceive no reason to comply with GAC's request that they testify.

The right of a defendant under the Federal Rules to assert claims against a third party by impleader or cross

* On September 9, 1976, the court in the New York federal court action denied petitioner's motion pursuant to Fed. R. Civ. P. 19(b) requesting that I&M's claims against petitioner be dismissed because the Injunction prevented petitioner from impleading or seeking joinder of UNC pursuant to Fed. R. Civ. P. 14(a) or 19(a).

claim is unquestionably an important one. As Professor Moore has stated:

> "The general purpose of Rule 14 is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence; and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant." 3 Moore, Federal Practice ¶ 14.04, at 501 (1964).

The importance attached to the rights embodied in Rule 14 is illustrated by the fact that, in order fully to effectuate the broad remedial purposes of the rule, the federal courts have held that there need not be diversity of citizenship between the defendant and third party defendant and that venue requirements need not be satisfied as between them. *E.g., Stemler* v. *Burke,* 344 F.2d 393 (6th Cir. 1965); *Agrashell, Inc.* v. *Bernard Sirotta Co.,* 344 F.2d 583 (2d Cir. 1965). To require petitioner to attempt to defend itself in federal court without the full range of protection afforded by federal law is, we submit, patently unconscionable; it is clearly not a result within the power of a state court to bring about.*

In short, this Injunction, which prevents any federal court from making a decision binding all parties affected by a given contractual provision, is an affront not only to

* Compare the reaction of another state appellate court which, recognizing the strong judicial interest in fair and expeditious resolution of controversies in forums where all relevant parties can be joined, not only reversed an injunction similar to that issued below, but deferred to the courts in a forum where all of the parties could readily be joined. *Csohan* v. *United Benefit Life Ins. Co., 33* Ohio App.2d 425, 200 N.E.2d 345 (Ohio Ct. App. 1964).

those federal supremacy considerations recognized by this Court in *Donovan* but also to judicial economy and efficiency.

2. *The Injunction Unconstitutionally Inhibits Petitioner's Access to Federal Courts Generally.* We had thought it clear, at least since *Donovan,* that state courts were utterly without power to enjoin a party's recourse to federal court in an *in personam* action, and that the extent to which a party's right to proceed in federal court was affected by a pending state court proceeding was a question within the exclusive power of the federal courts to decide. The astonishing contrary result reached below, we submit, mandates summary reversal by this Court.

The New Mexico Supreme Court, in upholding the Injunction, did not deem it necessary to state its reasons. The nearest it came to dealing with this Court's holding in *Donovan* was a comment from the bench that "the composition of the Court has changed" since *Donovan* was decided. Appendix E, p. 10a. In its briefs and arguments, UNC attempted to distinguish *Donovan* on the ground that it barred only state court interference with federal court actions already instituted against the party seeking the injunction and did not bar injunctions prohibiting filing future federal actions or injunctions prohibiting joinder of a new party in an on-going federal action. We submit that this reading of *Donovan* is entirely unwarranted either by the facts of that case or by the language of its holding.

In *Donovan,* a plaintiff class sought an injunction against construction of an airport runway and issuance of municipal bonds for that purpose. After entry of an adverse judgment and exhaustion of appeal in Texas State courts, many of the named plaintiffs, together with a group of new plaintiffs, filed a federal action raising issues substantially

identical to those in the terminated state action and seeking similar relief. This action had the effect of continuing the standstill caused by the state action, because under Texas State law the bonds could not issue while litigation challenging their validity was pending.

The City of Dallas moved to dismiss the federal action. It also applied to the Texas Court of Civil Appeals for an injunction against further prosecution of the federal action. That court refused the city's application, holding that it was without power to enjoin litigants from prosecuting an action in a federal court. *City of Dallas* v. *Brown,* 362 S.W.2d 372 (1962). On application for a writ of mandamus, the Texas Supreme Court held: (a) that the Court of Civil Appeals should issue the requested injunction and (b) that that court, if it concluded "that other suits to relitigate the same issues may be filed by other members of the class bound by the [state court] judgment", was empowered to "enjoin the filing of such suits by other members of the class". *City of Dallas* v. *Dixon,* 365 S.W.2d 919, 927 (1963). The Court of Civil Appeals then issued an injunction prohibiting all members of the class from further prosecution of the pending federal action and enjoining them from institution of "any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds". Following issuance of the injunction, the federal court granted the City's motion to dismiss. The plaintiffs in that case appealed, and certain of those plaintiffs filed a second action in federal court seeking to enjoin the Supreme Court of Texas from enforcing the previously issued injunction. Thereafter the Texas Court of Civil Appeals found each of the federal court plaintiffs in contempt of the injunction by virtue of either having

continued to prosecute the first federal action or having filed the second federal action. *City of Dallas* v. *Brown*, 368 S.W.2d 240 (Tex. Civ. App. 1963). The contempt citations directed to 26 of the federal court plaintiffs, including Donovan, were based solely on the fact that they had instituted the second federal court action after the Injunction had been issued (Record at p. 251).

This Court reversed, holding that the Texas courts were without power to restrain the federal court proceedings:

> "While Congress had seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here." 377 U.S. at 412-13.

Based on that holding, this Court vacated the judgments of contempt and remanded them for reconsideration in light of the holding that the order on which they rested was invalid.*

Nowhere in its opinion did this Court state, or even suggest, that the Texas Supreme Court order directing issuance of the injunction was invalid only in so far as it prohibited continued prosecution of existing federal actions. The order in fact prohibited the commencement of new actions as well as the prosecution of old, and it was held invalid in its entirety. The commencement of the second federal action was cited as a separate and independently sufficient ground for the judgment of contempt; as to 26 of

* On remand, the judgments of contempt were vacated. *City of Dallas* v. *Brown*, 384 S.W. 2d 724 (1964).

the respondents, the citation was based solely on their having instituted the second action; and the judgment was vacated in its entirety as having "rested on the mistaken belief that the writ prohibiting litigation by the federal plaintiffs was 'valid' 377 U.S. at 412.

The decisions below are also in conflict with the reading given *Donovan* by other state and federal courts. Circuit courts of appeals, ruling on the propriety of a dismissal of a federal district suit, have relied on *Donovan* to hold that a federal court must keep open its door despite the pendency of a state suit filed before the federal action. *Carr* v. *Grace*, 516 F.2d 502, 503 (5th Cir. 1975); *Miller* v. *Miller*, 423 F.2d 145, 146 (10th Cir. 1970). In *Bekoff* v. *Clinton*, 344 F. Supp. 642 (S.D.N.Y. 1972) and *Weisfeld* v. *Spartans Industries, Inc.*, 58 F.R.D. 570 (S.D.N.Y. 1972), *Donovan* was relied on in holding that state court injunctions against subsequent institution of federal proceedings were invalid. State authorities to the same effect include *Johnson* v. *Brown-Service Ins. Co.*, 293 Ala. 552, 307 So.2d 518 (1974) and *Crawley* v. *Bauchens*, 13 Ill. App.3d 791, 300 N.E.2d 603 (1973), *aff'd*, 57 Ill.2d 360, 312 N.E.2d 236 (1974).

Donovan does not stand alone, but is illustrative of the principle, long embedded in American constitutional jurisprudence, that the states are without power to curtail the jurisdiction of the federal courts in *in personam* actions. That principle is firmly grounded in Article III and Article VI of the Constitution. Thus, this Court has held that a state may not limit to state courts the enforcement of a right created by a state statute. *Chicago and N.W.R. Co.* v. *Whitton's Adm'r*, 80 U.S. 270 (1871). Similarly, a state's waiver of sovereign immunity for governmental units within the state may not be limited to suit in state courts. *Chicot County* v. *Sherwood*, 148 U.S. 529 (1893). Nor

may a state require out of state corporations to agree not to remove actions to federal court as a condition of doing business in the state. *Home Ins. Co.* v. *Morse,* 87 U.S. 445 (1874). The prohibition against state court injunctions of federal *in personam* proceedings did not originate with *Donovan,* but is, as the *Donovan* court noted, an "old and well-established judicially declared rule". 377 U.S. at 412-13. *See, e.g.* the cases cited by the Court at page 413 n.11. It has thus been the consistent view of this Court that federal court jurisdiction is a matter of federal law to be decided by the federal courts, and is not a matter within the province either of the state legislatures or of the state courts.*

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* The Santa Fe Court was of the view that "The institution or prosecution of other legal proceedings . . . would be vexatious and harassing". That finding rested on its view that "the parties to this suit should have their rights, duties and liabilities determined by this Court", that "determination of this lawsuit may fully resolve the disputes between the parties", and that, consequently, further litigation would be "multiplicitous". (Appendix A, pp. 1a-2a; Appendix B, p. 5a). Such conclusions (with which we emphatically disagree) are simply irrelevant under *Donovan,* which presented a far more sympathetic case for such a point of view. The plaintiffs there had prosecuted their case in the state court to a final judgment, and they had lost. Their only apparent motive for commencing the federal action was to make it impossible for the defendant to reap the fruits of its state court victory, since the mere pendency of that action, and the ensuing appeals, would operate to prevent issuance of the bonds.

In all events, the federal courts are certainly as capable as state courts in dealing with vexatious and harassing litigation.

Conclusion

Unwarranted interference by state courts with federal proceedings creates questions of paramount importance which require consideration by this Court. It should be made clear that such basic notions of federal supremacy as those embodied in *Donovan* are not to be disregarded because "the composition of the Court has changed".

For the reasons stated, the petition should be granted.

Respectfully submitted,

JOHN R. HUPPER,
W. DENNIS CROSS,
One Chase Manhattan Plaza,
New York, N. Y. 10005

JOHN D. ROBB,
20 First Plaza,
Albuquerque, New Mexico 87103

DANIEL K. MAYERS,
ROBERT B. MCCAW,
1666 K Street, N.W.,
Washington, D. C. 20006
Attorneys for Petitioner

Of Counsel:

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza
New York, N. Y. 10005

RODEY, DICKASON, SLOAN, AKIN & ROBB,
20 First Plaza,
Albuquerque, New Mexico 87103

WILMER, CUTLER & PICKERING,
1666 K Street, N.W.,
Washington, D. C. 20006

September 14, 1976

APPENDIX A

Preliminary Injunction

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

State of New Mexico, County of Santa Fe

No. 50827

United Nuclear Corporation,
a Delaware corporation,

Plaintiff,

v.

General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Defendants.

The above entitled cause having come on before the Court on plaintiff's application for a preliminary injunction prohibiting General Atomic Company or its partners, privies, agents, servants and employees from instituting or prosecuting any action or actions in any other forum, and notice having been given as provided by law, and the Court having considered all pleadings, affidavits, documentary evidence, briefs and argument of counsel, Finds:

1. This Court's jurisdiction over the parties and subject matter of this action attached prior to the institution of any proceedings in any other forum involving the subject matter of this action.

2. In the interest of orderly procedure, the parties to this suit should have their rights, duties and liabilities determined by this Court.

3. A determination of this lawsuit may fully resolve the disputes between the parties, thus obviating any need for further litigation concerning the subject matter of this suit.

4. Plaintiff will be irreparably injured should the injunction prayed for not be granted in that defendant has admitted that unless restrained it will seek to file additional actions against plaintiff and plaintiff will have no adequate remedy at law in that the harm sought to be avoided by this injunction will have occurred.

5. The institution or prosecution of other legal proceedings by any of the parties to this action, or their privies, would be vexatious and harassing and would be multiplicitous litigation, all of which is contrary to the speedy and orderly administration of justice.

6. The inconvenience, amount of litigation, and expense which would be suffered by the parties if other proceedings are instituted or prosecuted will be reduced or eliminated if a preliminary injunction is granted.

7. There is currently pending in the United States District Court for the District of New Mexico a case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil No. 76-032-B. There is also currently pending before the United States Court of Appeals for the Tenth Circuit an appeal entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

8. No bond or security need be given by United Nuclear Corporation as this injunction merely maintains the status quo between the parties and this preliminary injunction will benefit both parties in that the inconvenience and expense of multiplicitous litigation will be reduced or eliminated.

And the Court Concludes as matters of law that:

A. This Court has jurisdiction over the subject matter of this action and the parties hereto.

B. This Court has the authority to issue a preliminary injunction as requested by plaintiff and should do so, except, however, that this injunction

shall not operate so as to forbid Gulf Oil Corporation from prosecuting the case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B in the United States District Court for the District of New Mexico, a cause pending at the time application for this preliminary injunction was made, and the prosecution of that appeal to the Tenth Circuit Court of Appeals entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

It Is Therefore Ordered that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et. al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms.

Submitted:
Harry L. Bigbee
One of Pltfs. Attys.
William Federici
One of the Defendant's
Attorneys.

Edwin L. Felter
District Judge

APPENDIX B

Opinion of Felter, *D.J.*

STATE OF NEW MEXICO

FIRST JUDICIAL DISTRICT

March 29, 1976

BIGBEE, CARPENTER & CROUT
Attorneys at Law
P. O. Box 669
Santa Fe, New Mexico 87501

MODRALL, SPERLING, ROEHL, HARRIS & SISK
Attorneys at Law
P. O. Box 2168
Albuquerque, New Mexico 87103

MONTGOMERY, FEDERICI, ANDREWS, HANNAHS & BUELL
Attorneys at Law
P. O. Box 2307
Santa Fe, New Mexico 87501

Re: UNITED NUCLEAR CORP. v. GENERAL ATOMIC CO.
Santa Fe County #50827

Dear Sirs:

Consideration has been given to the pleadings, affidavits, testimony, briefs and arguments of counsel in the above-entitled and numbered case. Three issues are now before the Court for decision, namely:

1. Respondents' Motion to Dismiss for want of in personam jurisdiction over respondent.

2. Respondents' Motion to Dismiss for failure to join indispensable parties.

3. Plaintiff's application for a preliminary injunction.

I am of the opinion that this Court has in personam jurisdiction over respondents herein and that no defect in jurisdiction or otherwise exists by reason of any failure to join indispensable parties. Therefore, respondents motion to dismiss for lack of in personam jurisdiction and their motion to dismiss for failure to join indispensable parties are both denied.

Both parties made strong and convincing arguments of their respective positions upon plaintiff's application for a preliminary injunction. Either way the Court should rule on this issue would result in some inconvenience and expense to the losing party. I am satisfied that the Court has the authority to grant such a preliminary injunction except insofar as are concerned federal cases where the jurisdiction of the Court has already attached.

In the interest of orderly procedure, it occurs to me that the parties to this lawsuit should have their rights, duties and liabilities determined in this forum upon the merits of this case at the earliest possible date. Conceivably, such a determination could obviate in other forums, other litigation connected with the subject matter of this lawsuit. I believe that the sum total of inconvenience, litigation and expense, without analyzing which party to the greater extent may be affected thereby, can be ameliorated or reduced by the granting of the preliminary injunction. I believe that the ends of justice will be served better by the granting of the preliminary injunction than would be the case if it were refused. I am confident that once this case is decided on its merits, irrespective of which party prevails, that any remaining rights, duties or liabilities between the parties and those of any other interested parties can be and will be settled or litigated appropriately.

Accordingly, respondents will be enjoined preliminarily, from filing or prosecuting any other action or actions

against plaintiff in any other forum, relating to any of the rights, claims or subject matter of this lawsuit. The preliminary injunction shall include ordinary litigation, third party proceedings, arbitration proceedings and any and all other methods of prosecuting actions, claims, demands, etc. Jurisdiction of the District Court of the United States for the District of New Mexico already has attached in an action wherein Gulf Oil Corporation is plaintiff and United Nuclear Corporation is defendant. That case is excepted from the operation of the preliminary injunction hereby granted as required by Donovan v. City of Dallas, 377 U.S. 408, 84 S. Ct. 1579 (1964) rehearing denied 85 S. Ct. 14.

Counsel for plaintiff should submit to the Court for signature and filing an appropriate order consistent with the Court's ruling. Respondents may have twenty days from the date of entry of such order within which to plead to the merits or file such responsive pleadings as may be proper.

Very truly yours,

EDWIN L. FELTER
District Judge

ELF/ama

APPENDIX C

Alternative Writ

IN THE SUPREME COURT

Of the State of New Mexico

General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

v.

The Honorable Edwin L. Felter, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

To:

Hon. Edwin L. Felter
Judge of the District Court
Santa Fe, New Mexico

and

United Nuclear Corporation,
real party in interest

Greetings:

Whereas, a verified petition having been filed in the above entitled cause by Petitioner General Atomic Company, and good cause appearing for the issuance of an alternative writ, and a copy of the petition for said alternative writ being attached hereto as Exhibit "A";

Alternative Writ

Now, Therefore, you, the Respondent, Hon. Edwin L. Felter, Judge of the District Court of Santa Fe County, are hereby prohibited and restrained from taking any action to enforce the preliminary injunction entered April 2, 1976 in District Court Cause No. 50827 entitled United Nuclear Corporation v. General Atomic Company, Santa Fe County Cause No. 50827, until the further order of this Court; and to show cause by the filing of a response to said writ on or before the 26th day of April, 1976, why you should not be so prohibited and restrained and further to show cause why this alternative writ herein issued should not be made permanent.

Petitioner's Brief shall be filed on or before the 7th day of May, 1976; Respondent's Brief shall be filed on or before the 19th day of May, 1976; and oral argument will be had on the matter on the 9th day of June, 1976, at the hour of 9:00 o'clock, A.M., in the Supreme Court Hearing Room, Supreme Court Building, Santa Fe, New Mexico.

Witness, The Honorable LaFel E. Oman, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of April, 1976.

Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

[Seal]

APPENDIX D

Order of The Supreme Court of New Mexico

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

Wednesday, June 16, 1976

No. 10870

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

HON. EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

This matter coming on for consideration by the Court upon petition for alternative writ of prohibition or alternative writ of superintending control, and the Court having issued said Writ and having heard oral argument and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED by the Court that the alternative writ heretofore issued in the above entitled cause on the 14th day of April, 1976, be and the same is hereby quashed as having been improvidently issued.

Attest: A true Copy
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the court.

* * *

Mr. Eastham: If it please the Court, Mr. Robb will, after I conclude my simple point, get into the various issues in the various cases. My simple point is one that stands alone. It does not depend on the facts. It does not depend on what other cases are or are not filed around the country. It is a point that is completely controlled by the 1964 decision of the United States Supreme Court in *Donovan* v. *Dallas* and the attempted distinction of *Donovan* by opposing counsel simply does not hold up under analysis. *Donovan* makes it clear beyond dispute that Judge Felter acted beyond his jurisdiction when he purported to enjoin General Atomic and its privies from taking any action in Federal Court—*any* action in Federal Court. *Donovan* is basically founded in the United States Constitution, Articles III and Article VI, Article III, of course, being the judicial power article which sets it up in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish and states that the judicial power shall extend to all cases in law and equity, between citizens of different states and a bunch of other things. And then, of course, in Article VI we have the supremacy clause that states that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Justice Sosa: Mr. Eastham, even that case, though, had a vigorous dissent in it and the composition of the court has changed, has it not?

Mr. Eastham: Yes, it's a 6 to 3 decision that has stood on the books since 1964 without any serious attack of any kind that I have seen, and I certainly believe that it's the law—

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Justice Sosa: Well, did the *Donovan* case—the *Dono van* case did not mention as Judge Felter's Order did, vexatious and contentious litigation as apparently this—.

Mr. Eastham: Well, it didn't in one sense, Mr. Justice Sosa. It did certainly by implication because the whole basis of the dissent was—gosh, you guys, you six guys that are in the majority are ruling that you can bring vexatious cases, harassing cases, anything else you want in Federal Court. And I think by that dissent pointing that out I think it is made quite clear that the majority who obviously reads the dissent knew exactly what they were doing, they were saying that there was a right to bring federal actions be they vexatious, harassing, any other kind. The only exception that the Court spelled out was the *in rem* exception saying that once a Court gets jurisdiction of a *res,* whether it's a state or a federal court, that court has exclusive jurisdiction thereafter.

Justice Montoya: Except that the facts in the *Donovan* case and the facts in this case are quite dissimilar in the way the thing arose.

Mr. Eastham: Yes, *Donovan* is certainly a much more vexatious type of situation than ours. As you probably know from looking at it, Donovan on behalf of a bunch of people in Dallas brought suit in State Court, a class action to stop some airport bonds. He lost all the way through state court including denial of certiorari. Then he starts again; he starts in federal court, and he after bringing that case which had the practical effect of stopping the issuance of the bonds, the city goes in to get an injunction against him in state court.

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Justice Montoya: No, the Texas Supreme Court took it upon itself to order the Court of Appeals to—

Mr. Eastham: Right, I'm trying to go through the chronology. He first went into the Texas Court of Civil Appeals which ruled that they had no power to issue such an injunction. Then he took—then the city took a separate action in the Texas Supreme Court. The Texas Supreme Court in March of 1963 ordered, in effect, the Court of Appeals, saying if you don't issue a writ of prohibition, by golly, we will.

Justice Montoya: We'll order you to issue it, right.

Mr. Eastham: So the Court of Appeals being a very obedient court as Court of Appeals should be, proceeded on the 16th—I think these times are now crucial—on the 16th of April the Texas Court of Civil Appeals issued the writ prohibiting basically two things—they prohibited the plaintiffs and Mr. Donovan from carrying on any further in the pending federal court case and they further prohibited and enjoined Mr. Donovan and the plaintiffs from instituting any other litigation, lawsuits, or any actions relating in any way to the runway and the airport revenue bonds. Seven days later—seven days later on April 23, Mr. Donovan for the first time naming himself as a plaintiff joined by a number of the other plaintiffs in the federal action, brought a new suit—this was a new suit—in the United States District Court against the Texas Supreme Court and the Texas Court of Civil Appeals to restrain enforcement of this writ that was issued April 16. On May 22, 1963 the Texas Court of Civil Appeals, pursuant to motion filed by the City, entered a contempt judgment, fined the individual plaintiffs

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

including, I might add, some plaintiffs who had joined the second federal court action—the new post-injunction federal court action after it had been filed and had never been a plaintiff in any other action. Those persons were fined and Mr. Donovan was given twenty days in jail which he served. And it is shown in the records of the Supreme Court the sentence for Mr. Donovan and the fines for a number of the other persons was based solely on the fact that they filed the new action in Federal Court, not based on continuing with the pending action but they were fined and jailed based solely on the new federal action. Now this chronology in the *Donovan* case I've given you is to show exactly what the facts were because they are important and the chronology is important. Now Mr. Justice Black in speaking for the majority six justices outlined the true issue and I'm skipping the first sentence of *Donovan* which I will come to later but he towards the end of the case said the true issue was the propriety of a state court's punishment of a federal court litigant for pursuing his rights, pursuing his rights, to federal court remedies, and the court concluded that right—this is the right to pursue federal court remedies—was granted by Congress and cannot be taken away by the state. **The Texas courts were without power—that's the phrase the court used—without power** to take away the federal right by contempt proceedings or otherwise. Thus it's clear from looking at the facts and the language of the court that the court based its decision not on some principle of comity that the federal court proceedings should be allowed to continue once begun, but rather on the much more basic rationale that the right of a person to litigate in federal court cannot be taken away by the

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

states. The right to litigate can't be taken away, and obviously the right to commence a federal action in a federal court is a federal right to the same extent as the right to continue or complete such a pending action. Now the ingenious argument of opposing counsel before the lower court to the effect that the *Donovan* case applies only to pending cases apparently had its genesis in a presumption made by an author in 42 Am. Jur. 2d, § 236 which was quoted on page 4 of United's brief. This unknown author stated with regard to the *Donovan* rule:

> "Presumably the foregoing rule is limited to instances in which an action is actually pending in the federal court at the time the injunction is sought."

Interestingly, the only federal authority cited by this author was *Princess Lida v. Thompson,* the case decided in 1939 cited in the *Donovan* case, cited by the majority, the one holding that the *in rem* jurisdiction becomes exclusive in the first court that gets ahold of the *res.* So it doesn't support this presumption. And the only other authorities were three old state court decisions ranging in time from 1925 to 1950, all well before *Donovan* so how he arrives at this presumption based on those authorities is beyond us; and we have found no authorities since *Donovan* indicating that it applies only to pending cases and the reason is quite obvious—it can't because it did apply to a non-pending case, the contempt was issued for a non-pending case. *Donovan* included both sides of the coin—both the pending case and continuing in it—some people were punished for

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

that; and the filing of a new case, and some people were punished for that. And as I stated the—some of the persons held in contempt were held in contempt solely for bringing this new federal action. Now, opposing counsel attempts to get some aid and comfort from the language of Justice Black in the beginning of the *Donovan* opinion which talks about the question presented is whether a state court can validly enjoin a person from prosecuting an action in personam in a district or appellate court of the United States and so forth; making great point that the word "prosecution" somehow implies continuing something that already exists. Again, this is done without benefit of authority, this reading of the word "prosecution" as meaning something like continuing. In our reply brief we have set out authorities, including the United States Supreme Court, the Seventh Circuit, Black's Law Dictionary and Webster's Third New International—that's the latest great biggy—showing that the word "prosecution" includes commencing, conducting, carrying on and concluding. It doesn't mean carrying on solely. It includes the beginning, the middle and the end. We submit that this ruling of *Donovan* is clear. A state court cannot enjoin a person from bringing or conducting or concluding an in personam federal court action. The injunction issued by Judge Felter did exactly this. Accordingly, the writ of prohibition should be made permanent insofar as the injunction purports to prevent General Atomic and all the other persons and entities enjoined in that order from taking action of any kind in federal court. As I stated, my point does not depend on the facts. It goes to a whole question of power. Now Mr. Robb will go into the other aspects of this matter. Thank you.

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Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Mr. Bigbee: . . . O.K., here we've got *Donovan* and what does it say. The question here is whether a State Court can validly enjoin a person from prosecuting an action in personam and at this time Mr. Eastham says and so forth and so forth but I'll read the rest of the sentence, in a District or Appellate Court of the United States which has jurisdiction both of the parties and of the subject matter.—

Justice Oman: Let me ask you a question on that Gulf suit. I understand that is pending on your motion to dismiss.

• • •

Mr. Bigbee: Now here's our lawsuit and here's what the case which has jurisdiction both of the parties themselves. Yes, I've looked in Black's Dictionary. You don't prosecute anybody in vacuum. You've got to first file something. If the District Attorney decides to prosecute somebody, he's first got to get an indictment or a criminal complaint, then you go on, but that is not what's involved in *Donovan*. It says "further prosecute" and now I'm going to state the *Donovan* case real succinctly and I believe correctly. There's been a bunch of Love Field people and they had filed a suit in the Texas court and they had lost their lawsuit and there was a final judgment in it after appeal applying up to the Supreme Court of the United States. It was over. Period! Then they turned around and filed another suit after going through Texas all the way up to the Supreme,—the Texas Court of Civil Appeals—Supreme Court of Texas—Supreme Court of the United States. They filed a second suit in the Federal Court where it is claimed the matter is res judicata and just the statement at the bottom of the opinion the city filed a

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

motion to dismiss and an answer to the complaint in Federal Court. This is the second case, but the State case is over. But at the same time the city applied to the Texas Court of Civil Appeals for a writ of prohibition which was denied. The Supreme Court of Texas says, issue it. Now Texas Court of Civil Appeals' decision is interesting cause they hit the question right on the nose. They said the issue here is not vexatious and multiplicitous litigation cause there's only one case. It isn't simultaneous multiplicity of actions. The Texas case is over. There is nothing else to be done. The filing of a second case doesn't interfere with that action. The judgment's there. And they said the question is who determines the res judicata effect of the first judgment. That's what the Texas Court of Civil Appeals says and the Supreme Court of the United States said they hit it pretty close and the Texas Court of Appeals said this: If the res judicata effect is to be determined by the court, first court having the controversy, then it would be not only the determining factor as to whether it was res judicata but it could never be submitted any place else. Now they had res judicata effect. The Supreme Court of the United States and the Texas Court of Civil Appeals says it should be determined by the first court that's there, on that question of res judicata. The second suit's file. O.K., complete answer, it was sustained is, it is res judicata. It was good, but that was up to the Federal Court and was an obligation of full faith and credit to determine. You are not having two or three lawsuits going at once. Now, the Supreme Court of Texas erroneously tells Mr. Donovan that he is to dismiss the federal suit; in other words the federal, the Supreme Court of Texas, has taken it upon itself to make the determination whether the issues in the

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Texas court are identical to those of the Federal Court and res judicata should apply. Mr. Donovan doesn't do it. He shows his objections to dismissal and the second case filed there did not involve the merits of Love Field; it was just like when he refused to consent to the dismissal of the federal action. He was violating this erroneous order. He also filed a second suit in the federal court to prohibit the Supreme Court of Texas from keeping him from litigating the res judicata effect in the federal court. It didn't raise the issues of bondage, but he wasn't complying with that order. Now we have a very different situation. There was no "if" in Love Field case in the original *Donovan* case. Let's assume that those plaintiffs had filed, first a suit in State Court and they were trying it. Then they sue, filed another case in Federal Court involving the same issues. And then maybe another Federal Court District or another state or two where you have multiplicitous, simultaneous litigation. That was not presented. The very question of the minority opinion was they would have applied the rule of multiplicitous, vexatious litigation to successive actions. That is not our situation. What we're objecting to is simultaneous multiplicity and vexation. We filed our suit, we applied for TRO's, were turned down. They filed two suits, never just one. Two. Then we find out they want to join us in the Southern District of New York; they filed another one in North Carolina. They didn't quite hear—I don't if it's fully developed in the pleadings here—or both—they filed a lawsuit there and they've alleged we weren't joined on account of this order. They want to sue us all over the United States. Now they got their two bites of the apple. We filed our lawsuit and they

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

properly filed the case in Albuquerque, both of them. It's up to that court—interpleader would take precedence if it's reversed. I don't think there's interpleader jurisdiction. Those cases—in the Gulf case it's a matter of comity which court should continue in exercise and that will be submitted to Judge Bratton. We're not asking this court to tell Judge Bratton what he should do on that case. The *Donovan* rule, I think, may prohibit it. There are two real good cases. One following and one before the *Donovan* case. *Poole* v. *Mississippi Publishers* case which is there—the *Poole* case which is in our index. It puts a whole lot of cases together. The second case is that *600 California* case, just a Federal District Court opinion, but they pull all the intervening decisions together on what I'll call multiplicity simultaneous actions involving the same subject matter rather than successive actions filing one suit after another suit where the only issue is which court has jurisdiction to determine the res judicata effect. The first court or the second court where that issue is pending. The Supreme Court of the United States says res judicata is to be determined by the case, by the court where the second suit is filed, and I don't know of anybody in New Mexico who's ever tried to do it differently . . .

Mr. Bigbee: . . . So we think Judge Felter properly exercised his discretion; he had jurisdiction under the *Donovan* case; he had jurisdiction under the general weight of authority, and he exercised that jurisdiction and he had the power because we are not yet a party and jurisdiction has not yet attached against us in New York or North Carolina, which is the test of *Donovan*. I thank you very much.

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Mr. Eastham: Just a couple of quick comments about *Donovan*, first Mr. Bigbee read the language of the question relating to can it validly enjoin a person from prosecuting an action in personam in a district or appellate court of the United States which has jurisdiction, both of the parties and the subject matter. That jurisdiction obviously refers to whether they have the right to take this matter, whether it's then pending or in the future, has to mean that because, in fact, one of the actions involved in *Donovan* was an action which took place after the injunction. So that jurisdiction is a general jurisdictional clause; it didn't say, Black didn't say which has *taken* jurisdiction both of the parties and the subject matter but which *has* jurisdiction. That is an entirely different meaning. Secondly, and I think I answered this when a question was asked, I think, by Mr. Justice Sosa about the majority opinion on saying anything about vexation. That is true but the dissent and—there's three different places and at the end they say, "In any event, the statutory boundaries of federal jurisdiction are hardly to be regarded as a license to conduct litigation in the federal courts for the purpose of harassment." They were saying that in dissent—they lost.

Justice Sosa: My question was this: They said that you could not be enjoined from seeking redress in the federal courts if there was a Congressional—given authority by authorization of Congress, but my question again is in this particular case there are two cases that are presently pending in Federal Court already involving the same issues and the same subject matter that you have not been enjoined on and my question was—did you read into *Donovan* the fact

Excerpts from tape recording of hearing on June 16, 1976 in Santa Fe, New Mexico before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

that they said that that type of vexatious litigation could never be enjoined.

Mr. Eastham: That what's I read—

Justice Sosa: That's what you read into it.

Mr. Eastham: And Stewart, from in his dissent, in an earlier place says the power of a court of equity to enjoin persons subject to its jurisdiction from conducting vexatious and harassing litigation in another forum has not been doubted until now; in other words he's saying that that's the effect of the federal court action and I think the answer to it is, and I understand how this would disturb a judge, the answer is that the federal courts certainly have power to stay, to hold in abeyance any action. In other words, if the federal courts feel that there has been some vexation or harassment they can take care of the problems. It's not as though it's a remediless situation. Finally, Mr. Bigbee mentions the one post-*Donovan* case that he apparently is relying on—*500 California Corporation versus Hargine;* it didn't relate to *Donovan*—had nothing to do with *Donovan;* it was a case where a federal court issued an injunction against a state court action and that is a different thing. It's pursuant to a statute of the United States and relates to what federal courts can do as to the states. *Donovan* relates as to what the states can do with federal and I think it's quite clear.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-385

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

HARRY L. BIGBEE
DONNAN STEPHENSON
MICHAEL R. COMEAU
LARRY D. MALDEGEN
W. PERRY PEARCE
142 West Palace Avenue
Post Office Box 669
Santa Fe, New Mexico 87501

Attorneys for Respondent

Of Counsel:

BIGBEE, STEPHENSON, CARPENTER & CROUT
142 West Palace Avenue
Post Office Box 669
Santa Fe, New Mexico 87501

October 15, 1976

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Opinions and Orders Below

Petitioner General Atomic Company ("GAC") has failed to set forth completely the operative portions of the preliminary injunction which is the subject of GAC's Petition. The decretal portion of the preliminary injunction is set forth below:

> "IT IS THEREFORE ORDERED that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and

prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, crossclaims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms."

The order of the New Mexico Supreme Court from which GAC seeks review is set forth below:

> "This matter coming on for consideration by the Court upon petition for alternative writ of prohibition or alternative writ of superintending control, and the Court having issued said Writ and having heard oral argument and now being sufficiently advised in the premises;
>
> "Now, Therefore, It is Ordered by the Court that the alternative writ heretofore issued in the above entitled cause on the 14th day of April, 1976, be and the same is hereby quashed as having been improvidently issued."

We agree with GAC that since the New Mexico Supreme Court did not issue a written opinion, its reasons for quashing the writ of prohibition may best be gleaned from comments of the Court and counsel during oral argument. Accordingly, excerpts of that argument are attached hereto as Appendix I.

Jurisdiction

GAC'S FEDERAL CLAIMS WERE NOT CONSIDERED BY THE NEW MEXICO SUPREME COURT AND THE DECISION OF THE SANTA FE COUNTY DISTRICT COURT WAS NOT ONE BY THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD.

No opinion was written by the New Mexico Supreme Court in this action.[1] There is no indication that the New Mexico Supreme Court considered GAC's federal claims. It is at least as likely, probably more likely, that the New Mexico Supreme Court never reached GAC's federal claims, and, in fact, quashed the alternative writ as "improvidently granted" based upon an independent non-federal ground adequate to support its judgment. In New Mexico, prohibition is used sparingly and only where the remedy at law appears inadequate. *See, e.g., State ex rel. State Tax Commission v. Chavez,* 44 N.M. 260, 101 P.2d 389 (1940). An opportunity to appeal is an adequate legal remedy. *Pickering v. Justice of the Peace,* 16 N.M. 37, 113 P. 619 (1911).

In accord with established prohibition concepts, the New Mexico Supreme Court probably dismissed the alternative writ because GAC had failed to pursue its adequate legal remedy — that of interlocutory appeal.

It is plain from the response to the writ of prohibition, the briefs, argument of counsel and remarks of the Court that United Nuclear Corporation's ("UNC") claim that GAC's remedy was by interlocutory appeal, and not prohibition or supervisory control, was presented to and considered by the New Mexico Supreme Court. Attached hereto as Appendix I is an excerpt of the argument of UNC's counsel on this issue.

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[1]The New Mexico Supreme Court rarely writes opinions in original proceedings. During the period July 1, 1975, through June 30, 1976, disposition was made of a total of 62 original proceedings. Only two were disposed of by written opinion. The classification of one of them as an original proceeding is doubtful. Langham v. Beech Aircraft Corporation, 88 N.M. 516, 543 P.2d 484 (1975), concerned a question certified to the New Mexico Supreme Court from the United States Court of Appeals for the Tenth Circuit.

Where both non-federal and federal grounds have been properly raised and no opinion is delivered by the highest state court, this Court presumes that the decision of the highest state court is based upon the non-federal ground. *Durley v. Mayo*, 351 U.S. 277, 281 (1956). GAC's burden of establishing jurisdiction is not met where the New Mexico Supreme Court's judgment *might* have rested upon a non-federal ground. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). Of course, a ruling by a state court that prohibition is not a proper remedy is an adequate non-federal ground of decision. *Yesler v. Board of Harbor Line Com'rs.*, 146 U.S. 646, 657 (1892).

GAC urges in its Petition, at page 5, that if the New Mexico Supreme Court did not pass on the merits of its claim, then that refusal is equivalent to a refusal to hear a discretionary appeal and therefore the decision of the Santa Fe County District Court was by the "highest Court of a state in which a decision could be had" within the meaning of 28 U.S.C. §1257. Thus, GAC seeks certiorari directed also to the District Court of Santa Fe County.

This proposition urged by GAC shows a fatal misconception of New Mexico's practice and procedure. GAC's proper remedy in the District Court was to seek certification of the injunction question for interlocutory appeal pursuant to §21-10-3, N.M.S.A. 1953 (Supp.1975). This interlocutory appeal procedure is identical, in all material respects, to the federal interlocutory appeal statute, 28 U.S.C. §1292(b). GAC failed to seek this certification for discretionary appellate review.[2] This discretionary review

[2]GAC's failure to seek an interlocutory appeal on the injunction issue is inexplicable in light of the fact that it did apply for and receive the trial court's certification of a question of in personam jurisdiction for interlocutory appeal. UNC did not resist the allowance of the interlocutory appeal on the question of in personam jurisdiction, nor did the trial court hesitate to grant it. UNC would not have resisted the allowance of an interlocutory appeal on the propriety of the injunction. GAC has said it did not seek certification of the appeal because of the delay inherent in the appellate process. However, this argument over the delay overlooks the primary purpose of an interlocutory appeal — the expeditious disposition of interlocutory questions such as we have here.

must be sought; otherwise, the judgment is not one by "the highest court of a state in which a decision could be had." *Cf. Carrono v. Richmond*, 279 F. 2d 170 (2nd Cir. 1960). Only if the state trial judge refused to certify the injunction question for purposes of interlocutory review or if the Supreme Court of New Mexico declined to review the interlocutory injunction question, would the decision of the Santa Fe County District Court have been a decision by the "highest court of a state in which a decision could be had," making possible review by this Court. *Cf. Virginia Ry. Co. v. Mullens*, 271 U.S. 220 (1926). Neither of these circumstances occurred.

Another independent state ground of decision adequate to support the judgment was also urged by respondent UNC and may have been the basis of decision. GAC successfully sought to have the injunction in this action apply to UNC, as well as to it. UNC urged in its brief to the New Mexico Supreme Court that GAC was estopped to challenge the injunction because of the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings (Record: Brief of UNC, Point 5, p. 29).[3] This has been recognized as an adequate non-federal ground of decision. *Leonard v. Vicksburg S. & P. R. Co.*, 198 U.S. 416, 422-423 (1905).

Question Presented

Can a state court in an *in personam* action enjoin a defendant from instituting vexatious, harassing, multiplicitous litigation in the federal courts regarding the subject matter and issues of the pending case?

Constitutional and Statutory Provisions Involved

An additional statutory provision involved is the New Mexico interlocutory appeal statute, §21-10-3, N.M.S.A.

[3]References to "Record" are references to the New Mexico Supreme Court record for General Atomic Company v. Edwin L. Felter (No. 10870).

1953 (Supp. 1975), which provides in pertinent part:

> "A. In any civil action or special statutory proceeding in the district court, when the district judge makes an interlocutory order or decision which does not practically dispose of the merits of the action and he believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision.
>
> "B. The Supreme Court or court of appeals has jurisdiction over an appeal from such an interlocutory order or decision, as appellate jurisdiction may be vested in these courts. Within ten [10] days after entry of the order or decision, any party aggrieved may file with the clerk of the Supreme Court or court of appeals an application for an order allowing an appeal, accompanied by a copy of the interlocutory order or decision. If an application has not been acted upon within twenty [20] days, it shall be deemed denied."

Statement

Background[4]

This action arises out of a long history of prior dealings between the parties.

UNC has been engaged in the business of mining and milling uranium for the last twenty years. Approximately ten years ago, UNC entered into the business of manufacturing reload fuel assemblies for nuclear reactors. Prior to UNC's entry into this market, the only suppliers of manufactured fuel were the four domestic companies which manufacture nuclear reactors — General Electric, Westinghouse,

[4]This background narrative is taken from UNC's Response To The Alternative Writ of Prohibition. (Record: Response to Writ, pp. 5-8).

Babcock-Wilcox and Combustion Engineering.[5]

UNC was successful in penetrating this nuclear fuel market. Later, substantial delays were encountered in completing construction of nuclear reactors and commencing others. UNC, faced with capital demands from other portions of its business, found it necessary to obtain a partner for the nuclear fuel business who was willing to advance financing.

Gulf Oil Corporation ("Gulf") had previously attempted to break into the nuclear fuel business, but had been unsuccessful in developing the technological proficiency that UNC had already developed and which was required for customer (utility) acceptance. Negotiations between Gulf and UNC led to an agreement dated April 1, 1971, which looked to the formation of a jointly owned corporation known as Gulf United Nuclear Fuels Corporation ("GUNFC") to engage in the light water reactor fuel fabrication business. This agreement made provisions for the ownership, operations, financing and uranium supply for the new corporation.

On June 21, 1971, an agreement entitled the Preincorporation Agreement was entered into by Gulf and UNC and GUNFC was formed pursuant to that agreement.

The business of which UNC divested itself and assigned to GUNFC included, along with its entire fuel fabrication division, executed contracts with two utilities — The Indiana & Michigan Electric Company ("I&M") (contract dated August 18, 1967) and Commonwealth Edison Company ("Commonwealth") (two contracts dated June 10, 1966, and May 25, 1971). Negotiations with Detroit Edison and Duke Power Company had merely reached the letter of intent stage.

[5]For a history of UNC's early activities in this industry, *see* United Nuclear Corporation v. Combustion Engineering, Inc., 302 F. Supp. 539 (E.D. Pa. 1969), and United Nuclear Corp. v. Moki Oil and Rare Metals Co., 364 F.2d 568 (10th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966).

The Duke Power contract was actually executed after UNC sold its interest in GUNFC to Gulf. GUNFC also executed a contract with Detroit Edison in late 1972 which, however, was replaced by a completely new contract in March of 1975 between Detroit and GAC.

Many difficulties arose in the operation of GUNFC. In September of 1973, UNC sold Gulf its interest in GUNFC. The agreement between the parties provided that Gulf indemnified UNC for any claims or causes of action which the utilities might bring against UNC. Simultaneously with the execution of the Dissolution Agreement, Gulf and UNC entered into an agreement, bearing the date of June 30, 1973, called the Supply Agreement for the supply of approximately 25,000,000 pounds of uranium. The Supply Agreement is the subject of the Santa Fe litigation between UNC and GAC.

Following the divestiture of UNC's interest in GUNFC, Gulf operated GUNFC as a wholly owned subsidiary. It alone administered the utility agreements. Subsequently, Gulf merged GUNFC into itself and on January 1, 1974, it transferred the assets and obligations of GUNFC (including the utility contracts) to a partnership called General Atomic Company (the petitioner herein) composed of itself and Scallop Nuclear, Inc., a Royal Dutch/Shell company. (Record: Response to Writ, Ex. 32 at 655, 658).

The New Mexico State Court Action

This action was filed on December 31, 1975, by UNC, seeking to set aside the June 30, 1973, Supply Agreement.[6] The theories upon which UNC bases its claim for relief may be summarized as follows:

(1) Fraud and economic coercion;

(2) Breach of contract and fiduciary obligations;

[6]UNC amended its complaint on April 5, 1976, to add a count involving the rights of the parties concerning a 1974 contract relating to an additional 3,000,000 pounds of uranium.

(3) Violations of the antitrust laws of New Mexico, §§49-1-1, *et seq.*, N.M.S.A. 1953;

(4) Limitation of liability;

(5) Commercial impracticability and force majeure.

This action is a continuation of an action filed on August 11, 1975, by UNC against GAC, Gulf and Scallop Nuclear, the latter two parties being constituent partners of GAC. Gulf removed the entire action, pursuant to 28 U.S.C. §1441(c), to the United States District Court in Albuquerque on the basis that UNC had stated a separate and independent claim against Gulf. UNC voluntarily dismissed that suit and filed the instant action.[7]

On January 15, 1976, GAC obtained an order granting an extension of time within which to answer or file objections to interrogatories propounded by UNC and to answer or

[7]The petitioner correctly points out that UNC first filed a suit in state court which Gulf removed to the United States District Court. While it was pending on UNC's motion to remand, UNC dismissed the first suit and refiled in state court. The petitioner concedes the propriety of UNC having a desire to litigate in New Mexico, but says "that does not explain why UNC took a non-suit and dropped a party in order to prevent removal to the Federal District Court in New Mexico." If an explanation is owing, it is easily made. The first suit was against GAC, but also named its constituent partners, Gulf and Scallop, in that capacity. They were named for no other reason, and no independent cause of action was intended to be stated against Gulf. Whatever ruling the U.S. District Court might have made on UNC's motion to remand, because of the jurisdictional question arising from a lack of diversity between Scallop and UNC, an interlocutory appeal (a possibility suggested by the court) would have been essential, involving at best long delay and at worst commencing anew in state court. *See* American Fire and Casualty v. Finn, 341 U.S. 6 (1951). UNC took the obvious course of dismissing that action and refiling in state court without naming Gulf and Scallop as parties. Inferences and criticism of UNC for a decision to litigate in a court which has jurisdiction, contrasted to litigating in one which may not, seems unwarranted. No one has said that the federal district court had jurisdiction of the first action except counsel for GAC and Gulf. Certainly, the court never so ruled.

otherwise plead to the complaint. (Record: Response to Alternative Writ, p. 2). Counsel for UNC learned at the chambers conference held by the trial judge on GAC's request for an extension of time that GAC intended to file a suit in another jurisdiction concerning the subject matter of this action.

On January 19, 1976, UNC filed an application for a temporary restraining order and preliminary injunction seeking to prohibit GAC from filing any suit in another forum concerning the subject matter of this action. The court ordered that opposing counsel be notified and given an opportunity to object to the application for a temporary restraining order. Opposing counsel were notified and appeared in opposition to the application. The application was denied. (Record: Response to Alternative Writ, p. 3).

GAC, while the application was being heard, filed a statutory interpleader action in the United States District Court for New Mexico naming UNC and the four utilities as defendants. (Record: Response to Alternative Writ, p. 3). One day later, January 20, 1976, Gulf also filed a suit in the

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[7](cont.)

GAC also makes statements relating to the resignation of Justice Stephenson from the New Mexico Supreme Court to rejoin the law firm with which he had previously been associated for many years. This statement is made for the purpose of having this Court erroneously infer that GAC cannot obtain fair and impartial decisions from the New Mexico state courts. GAC denied any such implication before Judge Frankel of the United States District Court for the Southern District of New York. In that action, GAC's attorney made a statement comparable to the one contained in the footnote on p. 9 of the Petition but explained his statement as follows: "I am not making any suggestion at all that Justice Stephenson was sitting on the Supreme Court of New Mexico at the time some of the proceedings were before this court, or had anything to do with that proceeding. I am not suggesting he acted in any way improperly while he was on the court.*** I say that with the greatest of respect for the New Mexico state court system and in particular Judge Felter." (See Appendix II attached hereto.)

GAC introduced these statements in evidence in the trial court and in open court reaffirmed that they had intended no aspersions against anyone. We believe GAC should be censured for trying to inject an inference they know to be false in this Petition.

United States District Court for the District of New Mexico against UNC, the issues of which concerned the subject matter of the Santa Fe County action. (Record: Response to Alternative Writ, p. 3).

On February 25, 1976, GAC moved to dismiss this action on the grounds that the court lacked personal jurisdiction over GAC. Thereafter, on March 9, 1976, GAC filed a second and separate motion to compel joinder or to dismiss this action on the ground that UNC had failed to join parties (the utilities) necessary for a just adjudication under Rule 19. (Record: Response to Alternative Writ, p. 3).

On March 15, 1976, UNC filed a second application for a temporary restraining order and preliminary injunction. UNC believed that GAC or its partners intended to file a third party complaint against UNC in a case brought by the Indiana & Michigan Electric Company ("I&M") against GAC, Gulf and Scallop Nuclear in the United States District Court for the Southern District of New York, as well as additional actions. The District Court granted UNC's *ex parte* application for a temporary restraining order and set the preliminary injunction down for hearing. (Record: Response to Alternative Writ, pp. 3, 4).

GAC, in its response to the application for injunction, admitted its intention to join UNC in an arbitration action between Duke Power and GAC and in any actions or arbitration proceedings between GAC and any of the utilities. (Record: Response to Alternative Writ, pp. 3, 4).

The District Court thereafter, following a hearing, presentation of documentary evidence and submission of briefs, ruled that a preliminary injunction should be granted restraining GAC, its partners, privies, agents, servants and employees, from instituting any kind of legal proceedings relating to the subject of the Santa Fe action against UNC in a jurisdiction other than the District Court of Santa Fe County. (Record: Response to Alternative Writ, pp. 3, 4).

After the District Court announced its ruling in a letter granting the preliminary injunction, a hearing was held in the trial judge's chambers regarding the form of the preliminary injunction. At that hearing, counsel for GAC sought and obtained an injunction against UNC binding UNC to the same injunction terms that ran against GAC. (Record: Response to Alternative Writ, pp. 3, 4).

The District Court found that its jurisdiction had attached prior to the institution of actions in any other forum relating to the subject matter of the instant suit. It found that in the interest of orderly procedure, the parties to this suit should have their rights, duties and liabilities determined in this forum. It found that UNC would be irreparably injured and would have no adequate remedy at law should the preliminary injunction not be granted. Finally, the court found that the institution or prosecution of other legal proceedings[8] by any of the parties to this action would be vexatious, harassing, multiplicitous litigation, contrary to the speedy and orderly administration of justice. This finding of vexation was unchallenged by GAC in its prohibition action and should not be reexamined by this court. *Grayson v. Harris*, 267 U.S. 352, 358 (1925). (Record: Response to Alternative Writ, p. 5).

At the same time the court granted the preliminary injunction, it also denied both of GAC's motions to dismiss. However, an interlocutory appeal was certified by the District Court on the issue of personal jurisdiction, at the request of GAC. GAC did not request that it be granted an interlocutory appeal from the injunction. (Record: Response to Alternative Writ, p. 5).

The Various Lawsuits

1. THE ILLINOIS STATE COURT ACTION

The first of many lawsuits filed by GAC relating to its

[8]The two pending federal cases, GAC v. Duke Power, *et al.*, No. 76-029-B (D.N.M.) and Gulf v. UNC, No. 76-032-B (D.N.M.), were excepted from the injunction.

disputes with UNC and the utilities was instituted by it in the Circuit Court of La Salle County, Illinois, against Commonwealth Edison Company, Cause No. 74 L 965, alleging that GAC did not have to perform the contract it inherited from UNC. The complaint alleged that the contract was terminated pursuant to a cancellation provision and that performance was commercially impracticable. The state court ordered the parties to arbitrate and that decision is now on appeal to the Illinois Supreme Court. This case refutes GAC's contention that it will be hopelessly prejudiced if UNC is not joined in actions between GAC and the utilities. Here GAC failed to consult, notify, or even name UNC as a party.

2. THE ILLINOIS FEDERAL COURT CASE

On January 15, 1975, Commonwealth Edison filed suit in the United States District Court in Chicago against GAC, Gulf, Scallop and UNC, Cause No. 75-C-153, seeking to force the defendants to arbitrate Commonwealth's dispute with GAC. Arbitration was ordered by the District Court and its order was recently affirmed by the U.S. Court of Appeals for the Seventh Circuit.[9]

3. THE NEW MEXICO FEDERAL INTERPLEADER

At exactly the same time the trial court denied UNC's first application for a temporary restraining order, GAC filed an interpleader action, on January 17, 1976, pursuant to 28 U.S.C. §1335, in the United States District Court for the District of New Mexico, No. 76-029-B, against UNC and the utilities. This interpleader was dismissed for lack of subject matter jurisdiction because, as the District Court stated, "plaintiff [GAC] is not a party that is or may be subjected to conflicting claims by two or more defendants growing out of a single obligation of the plaintiff." (Record: Response to Writ, Ex. 41, p. 746, Order of Dismissal in Interpleader Action, No. 76 029-B (D.N.M.)). The District Judge recognized that GAC's obligations to each utility are separate and distinct

[9]Commonwealth Edison v. Gulf, Nos. 75-2146, 75-2147 and 75-2148 (7th Cir., September 20, 1976).

from any rights and obligations between GAC and UNC. This case is currently on appeal to the United States Court of Appeals for the Tenth Circuit, No. 76-1152. This case was specifically excepted from the operation of the injunction.

4. The Gulf Case

On January 20, 1976, the day after UNC's first attempt to obtain a temporary restraining order and the day after GAC filed the interpleader, Gulf, one of GAC's constituent partners, filed a suit for declaratory judgment against UNC in the United States District Court for the District of New Mexico, No. 73-032-B, seeking to obtain a declaration that a purported release contained in the September 12, 1973, Dissolution Agreement was valid and enforceable and barred UNC's claims against GAC. This case was dismissed on UNC's motion on September 29, 1976, the Court declining to take jurisdiction of the action because the rendering of declaratory relief would not resolve all issues between the parties, while a decision in the Santa Fe action would afford complete relief.

5. The New York Case

On February 24, 1976, I&M instituted suit against GAC in the Southern District of New York, No. 76 Civ. 881 (MEF), seeking specific performance of its contract with GAC to supply uranium and fabricated nuclear fuel. GAC moved to dismiss the action for failure to join UNC as a party needed for a just adjudication under Rule 19, Fed.R.Civ.P. In his opinion (attached hereto as Appendix III) denying the motion, Judge Frankel, quoting from I&M's brief, stated:

> "The central substantive issue in this case is whether GAC must provide uranium to I&M under the I&M-UNC Contract. The central issue as between GAC and UNC is whether under the agreement between them (to which I&M is not a party, upon which the rights of I&M are in no way dependent, and which has generated an array of issues having no connection with I&M) UNC

> must provide GAC with the uranium it needs to perform its obligations under the I&M-UNC Contract."

6. The Duke Arbitration

On February 17, 1976, Duke Power Company filed a demand for arbitration against GAC seeking specific performance or damages occasioned by GAC's failure to perform its contract with Duke Power. GAC resisted that demand by filing the suit detailed below.

7. The Duke Power Case

On May 28, 1976, GAC filed suit in the United States District Court in Charlotte, North Carolina, against Duke Power Company, No. C-C-76-17E, seeking to stay arbitration proceedings previously demanded by Duke Power and to obtain a declaration of its rights and obligations under its contract with Duke. One of the reasons GAC advanced to support a stay of arbitration was the absence of UNC from the arbitration. In ordering the parties to arbitration (Appendix IV attached hereto), the District Judge said:

> "As to the request for a delay because United Nuclear Corporation is not a party defendant, two points should be noted:
>
> (a) United Nuclear, as a guarantor[10] only of the 1973 contract in suit, would not be an improper party, but it is certainly not a necessary party to a determination of the rights of General Atomic and Duke under the arbitration agreement.
>
> (b) A state court in New Mexico has entered an order, binding upon General Atomic, the plaintiff herein, enjoining plaintiff from litigating in any other court, or arbitrating, its claims against United

[10] UNC disputes that it has guaranteed the Duke contract or any of the utility contracts. The Duke contract was executed after UNC had sold its interest to GUNFC.

Nuclear pending decision by the New Mexico state court. Despite that court order, General Atomic suggests that the court should bring United Nuclear into the arbitration proceedings on its own motion, and in any event should not permit arbitration of Duke's claim until United Nuclear has been brought into the arbitration proceedings. The one would be a violation of the letter and the other the spirit of the New Mexico court order. Moreover, I am unwilling to accept the suggestion that the New Mexico courts will not give General Atomic a fair hearing because United Nuclear, apparently a publicly held corporation, digs uranium in New Mexico. This court must and will proceed upon the premise that the New Mexico court will decide the case on its merits without regard to where the uranium is dug."

8. The I&M New Mexico Case

On August 22, 1975, UNC filed suit against I&M and American Electric Power Service Corporation in district court in McKinley County, New Mexico, seeking a quiet title to certain of UNC's uranium ore reserves. The 1967 contract with I&M, now held by GAC, is unique in that certain of UNC's ore reserves are dedicated to I&M. I&M removed this case to federal district court in New Mexico where it is now subject to an indefinite stay of proceedings. GAC has recently sought to intervene in this action.

In addition to having federal judges in three federal courts reject its claim that UNC was a necessary or indispensable party in its litigation with the utilities, or that its obligations to the utilities were dependent on performance by UNC of its contract with GAC, the converse of that argument has been rejected by the New Mexico state courts. GAC moved to dismiss the Santa Fe action for failure to join the utilities as indispensable parties. This attempt was rejected by the Santa Fe County District Court as well as by the New Mexico Supreme Court in GAC's prohibition action.

Reasons For Not Granting The Writ

The thrust of this Petition is based upon GAC's contention that *Donovan v. City of Dallas*, 377 U.S. 408 (1964), deprives a state court of the opportunity to protect is jurisdiction and prevent misuse of the judicial system by enjoining, except for pending federal actions, a party from instituting further piecemeal, vexatious, harassing litigation in the federal courts. There is apparently no dispute over the power of a state court to enjoin parties before it from instituting vexatious litigation other than in federal courts. *Poole v. Mississippi Publishers Corp.*, 44 So.2d 467 (Miss. 1950); Annot. 6 A.L.R.2d 896 (1949). UNC submits that there is nothing in *Donovan*, its progeny,[11] or the Constitution which prohibits the injunction issued here.

GAC's entire argument is predicated upon the proposition that UNC is obligated to the utilities to furnish them with uranium and thus GAC will be irreparably injured if GAC is not allowed to join UNC and the utilities in the same action. This theory, endlessly intoned and invariably rejected, forms the basis for GAC's complaint that it has been hopelessly prejudiced and deprived of its constitutional rights by the injunction. No court, federal or state, to which this issue has been presented, either directly or tangentially, has ever given it credence. Each rebuff, rather than demonstrating to GAC the final resolution of the argument, seems to merely inspire GAC to file more lawsuits upon this same question.

An examination of the facts which underlie the legal relationships of UNC, GAC and the utilities demonstrates the fallacy of GAC's contention concerning UNC's fancied obligations to the utilities.

UNC did not execute, nor was it a party to, all of the contracts referred to by GAC in its petition. Some of them

[11] On page 19 of its Petition, GAC cites certain federal and state cases as upholding its construction of *Donovan*. Suffice it to say that none of these cited cases bears the remotest resemblance to the factual or legal situation presented by the instant case.

were executed by UNC, but others represented mere negotiations evidenced by letters of intent. Whatever these rights and obligations may have been, they were all assigned, with the approval of the utilities, to GUNFC and subsequently to GAC.

The uranium supply agreement of June 30, 1973, which is the subject of the UNC-GAC dispute, requires, if it is valid, that UNC furnish certain uranium to GUNFC, or to GAC, its successor, not to the utilities which were not parties to that contract. It is the validity of this contract and the nature and extent of the rights and obligations of the parties thereto (UNC and GAC) which form the principal issues in the Santa Fe County litigation.

Thus, as matters stand, GAC is obligated to the utilities for performance of their contracts which, incidentally, do not involve the mere furnishing of component uranium, but also fuel fabrication manufacturing and services. UNC's obligations, if any, are to GAC. That this was the understanding of the parties is aptly illustrated by the fact that Gulf has indemnified UNC from liability for any claims which might be asserted against it by the utilities. (Record: Ex. 7 to First Amended Complaint; p. 176 of Exhibits to Response to Alternative Writ, Vol. 1).

The issuance and enforcement of the injunction does not in any manner conflict with this Court's decision in *Donovan v. City of Dallas*, 377 U.S. 408 (1964). The unchallenged finding of fact by the trial court relating to GAC's propensity for multiplicitous litigation makes clear the necessity of the injunction. This finding of fact, coupled with the trial court's clear adherence to the *Donovan* decision,[12] shows that the Petition for Certiorari is baseless.

[12]The trial court excepted two pending federal actions where jurisdiction had been obtained over UNC, but enjoined the attempted joinder of UNC in additional state, federal or arbitration action where jurisdiction had not yet attached over UNC.

The preliminary injunction contains the following finding of fact:

> "5. The institution or prosecution of other legal proceedings by any of the parties to this action, or their privies, would be vexatious and harassing and would be multiplicitous litigation, all of which is contrary to the speedy and orderly administration of justice." (Record: Preliminary Injunction).

The trial court made this finding only after it denied UNC's first application for a temporary restraining order. After the trial judge denied UNC's first application, GAC thereupon filed the federal interpleader and caused its constituent partner Gulf to file an overlapping declaratory judgment action against UNC in federal court. Thereafter, upon a showing that GAC intended to join UNC in still other actions and arbitrations in distant jurisdictions, and after a decision that the utilities need not be joined, the injunction was issued, excepting from its scope the two New Mexico federal actions filed by GAC and Gulf. A comparable ruling regarding the joinder of GAC, UNC and the utilities had previously been made in the federal interpleader. The trial court's decision regarding the joinder of the utilities was reviewed by the New Mexico Supreme Court in GAC's prohibition action and rejected. It has not been reasserted in this Petition. GAC's motions to determine that UNC is an indispensable party in actions with the utilities have likewise been rejected by federal judges in New York and North Carolina.

GAC's Petition to this court attempts to portray the New Mexico courts as being ignorant of the dictates of *Donovan*. The issue decided by this Court in *Donovan* was narrowly framed:

> "The question presented here is whether a state court can validly enjoin a person from prosecuting an action *in personam* in a District or Appellate court of the United States which has jurisdiction both of the parties and of the subject matter." 377 U.S. at 408.

The narrow question presented by *Donovan* grew out of an equally narrow grant of certiorari in which this Court stated:

> "We declined to grant certiorari to review the United States District Court's dismissal of the case before it or its dismissal of the appeal brought on by the state court's coercive contempt judgment, but we did grant certiorari to review the State Supreme Court's judgment directing the Civil Court of Appeals to enjoin petitioners from prosecuting their action in the federal courts and also granted certiorari to review the Civil Court of Appeals judgment of conviction for contempt." 377 U.S. at 411.

The two statements quoted above provide the linchpin of the *Donovan* decision. The broad prohibition against state court injunctions which GAC believes is contained in *Donovan* has no basis either in the facts of that case or in this Court's opinion.

This Court held in *Donovan* that even where a party has prevailed in a case which has been decided by the highest court of a state, that party cannot have a state court enjoin the relitigation of the same questions presented in a federal court after jurisdiction has attached in the federal court. The parties' remedy in such a situation is to plead the state court judgment as res judicata in the federal action. The federal court is then able to dispose of the case based upon the "full faith and credit" clause of the Constitution and the principle of res judicata. This procedure is consistent with the principle that state and federal courts possess concurrent jurisdiction in in personam actions and also enforces the *Donovan* rule that:

> "***where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.***" 377 U.S. at 413.

As UNC's Statement of the Case shows, the trial judge issued his injunction in this case based upon an entirely

different set of facts and equitable considerations than those present in *Donovan*. UNC was faced with litigation of the same issues in both state and federal courts in New Mexico. UNC was faced further with the threat of the institution of additional actions by GAC relating to identical issues contained in the Santa Fe action in various state and federal courts throughout the nation. This was not merely a threat of relitigation of an action in federal court which had already been previously decided in the courts of a state. Rather, GAC was actively attempting to use arbitration proceedings and the state and federal courts for the purpose of piecemealing the Santa Fe County case and to force UNC to participate in multiplicitous litigation, thereby restricting UNC's ability to protect its rights. It was this actual and threatened abuse of the use of the courts which the trial judge found to be vexatious and harassing. If anyone is faced with inconsistent judgments, it is UNC by being forced to litigate the same issues in five or six different forums.

UNC's adversary in this litigation, and the only true one it has, is GAC, a partnership comprised of Gulf Oil Corporation and Scallop Nuclear, Inc., a Royal Dutch/Shell company. Gulf and Royal Dutch/Shell are old and established multinational oil companies. They are usually counted among the ten largest corporations in the world. Their resources are combined in GAC. Singly or in concert, they have adopted and energetically pursued a plan of piecemeal litigation on a coast-to-coast basis in an effort to prevent the actual controversy which pends between GAC and UNC being litigated in a single lawsuit. By prostituting the orderly processes of the judicial system, they seek to bring their economic power to bear to preclude an orderly resolution of the only controversy which exists. The finding in the preliminary injunction to the effect that GAC will, unless restrained, file additional actions against UNC which would be vexatious, harassing and multiplicitous is richly justified. GAC is using its tactics of multiplicitous litigation in its continuing effort to obtain control over UNC's uranium reserves. The law recognizes that oppressive litigation is one of the most potent weapons in the arsenal of the corporate predator. *See* Givens, *Litigation as a Means of Economic*

Competition, 27 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 572 (1972); Blecher and Bennet, *Litigation as an Integral Part of a Scheme to Create or Maintain an Illegal Monopoly,* 26 MERCER L.REV. 479 (1974). To hold that no court could protect its jurisdiction under such circumstances would have the effect of permitting industrial giants, such as Gulf and Royal Dutch/Shell to bring their unlimited resources to bear upon UNC so as to deny UNC the right and opportunity to have its day in any court.

Within this framework other issues than those proposed by GAC come to the fore. These include: 1) How many lawsuits does GAC have a constitutional right to assert against UNC? 2) Should GAC be permitted to pursue a program found by the trial court to constitute harassment through the filing of vexatious and multiplicitous litigation? 3) Is it possible for a civil litigant of limited resources to bring its case to trial when opposed by an array of economic might which has embarked upon a program of oppressive piecemeal litigation? To pose these questions is to answer them.

In *Donovan*, the Court did not consider the question of whether a state court could enjoin the *institution*, as opposed to the *prosecution*, of an action in the federal court. The majority opinion stated the issue in *Donovan* as follows:

> "The question presented here is whether a state court can validly enjoin a person from *prosecuting* an action *in personam* in a district or appellate court of the United States *which has jurisdiction both of the parties and of the subject matter.*" 377 U.S. at 408 (emphasis added).

At the time the injunction was granted, there were no pending federal actions between GAC and UNC encompassed within the scope of the injunction. Two cases were pending in federal courts to which UNC is a party — *General Atomic Company v. Duke Power, et al.*, No. 76-029-B (D.N.M.), and *Gulf Oil Corporation v. United Nuclear Corporation,* No. 76-032-B (D.N.M.). The trial judge, recognizing the command of *Donovan,* judiciously avoided including the above causes then pending in federal courts in

his injunction. He recognized that while the filing of these actions partially formed the basis for his finding of vexatious and harassing litigation, he was without power to enjoin their prosecution under this Court's holding in *Donovan.*

If, in *Donovan,* the state court had excepted the one pending federal action (as the injunction here excepts two pending federal actions), and if a plan of further vexatious, harassing litigation had been shown and enjoined, a completely different issue would have been presented. That situation is the one presented by this case but was not presented in *Donovan.*

Donovan and other authorities have long recognized the distinction between prohibiting the *institution* of suits and injunctions against the *prosecution* of suits already pending. State-federal antisuit injunctions present troublesome problems of comity where in personam proceedings are involved because of the danger of reciprocal injunctions which may leave the parties without a remedy. For this reason, a state court does not have jurisdiction to enjoin proceedings in a federal court once jurisdiction has attached in the federal forum. *Donovan v. City of Dallas, supra; Blanchard v. Commonwealth Oil Company,* 294 F.2d 834 (5th Cir. 1961). The prohibition against state-federal antisuit injunctions has not been directed against the future institution of proceedings in federal court and the authorities have maintained this distinction. See *Lyons v. Importers and Traders National Bank,* 63 A. 827 (Pa. 1906) (distinguishing case where suit in federal court had not yet been commenced), and *Wheeler v. Vimalert Co.,* 235 App.Div. 643, 255 N.Y.S. 114 (Sup. Ct. 1932) (distinguishing injunctions prohibiting the institution of further suits).

In a parallel situation to that faced by state courts, federal courts are barred by statute from restraining or enjoining *pending* litigation in state courts. 28 U.S.C. §2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where

necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The federal cases uniformly hold that the federal anti-injunction statute, 28 U.S.C. §2283, does not apply to state proceedings which have not yet commenced, thus recognizing the distinction between enjoining the *institution* of actions as opposed to enjoining the *prosecution* of pending litigation. *Scott v. Hunt Oil Co.*, 398 F.2d 810 (5th Cir. 1968). For example, in the recent case of *Barancik v. Investors Funding Corporation of New York*, 489 F.2d 933 (7th Cir. 1973), the court noted with respect to the federal anti-injunction statute that the timing of a litigant's resort to the state court is significant. Holding that the applicability of 28 U.S.C. §2283 must be determined as of the time of the federal court's injunction, the Court stated:

"[T]iming may affect the exercise of a federal judge's discretion; it may also affect his power." 489 F.2d at 936.

See also Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965) (threatened criminal prosecution); *Scott v. Hunt Oil Co., supra; Walter E. Heller & Company, Inc. v. Cox*, 379 F.Supp. 299, 309 (S.D.N.Y. 1974) (threatened civil proceedings); *McQueen v. Druker*, 317 F.Supp. 1122, 1133 (D.Mass. 1970) (landlord and tenant).

The authority upon which GAC relies so heavily, *Donovan v. City of Dallas, supra*, makes clear that the New York I&M action does not come within the proscription of the *Donovan* rule. UNC had not been joined in the New York I&M action when the injunction was issued. In the words of Justice Black in *Donovan*, "jurisdiction had not yet attached" over UNC in that New York action.

The prohibition against a state court enjoining a party from instituting federal proceedings applies only where the federal court already:

"*. . . has jurisdiction both of the parties and of the subject matter.*" *Donovan v. City of Dallas*, 377 U.S. at 408 (emphasis added).

Federal actions pending against UNC at the time of the injunction were excepted from the injunction. In *Donovan* the defendants were enjoined from prosecuting a pending federal action wherein the federal court had obtained jurisdiction of the cause and of the parties.

It seems clear from a reading of *Donovan* that the concerns motivating the majority were the interference by a state court with an ongoing federal action which had jurisdiction of the cause and all parties and the availability of an expeditious, economical and adequate legal remedy to the federal defendants — that of pleading the bar of res judicata. Here, both concerns are totally absent. There were no federal actions, within the scope of the injunction, pending against UNC at the time of issuance. Thus, the *Donovan* feature of state interference in ongoing federal proceedings is lacking in this case. Likewise absent is the presence of an expeditious or adequate legal remedy for UNC. It gives UNC little comfort to hear suggestions that two of the largest corporations in the world can force UNC to travel hither and yon to litigate in forums in which is has no interest, over issues which do not concern it, with parties with whom it has no quarrel.

In its Petition, GAC claims that it has been denied the opportunity to raise defenses and make claims. This is clearly not an accurate statement of the position in which GAC has placed itself. GAC has had and continues to have opportunities to assert all claims and defenses available to it in multiplicitous suits already pending and not enjoined before various federal and state courts where jurisdiction has been obtained over UNC.

GAC argues that impleader, under Rule 14, Fed. R. Civ. P., is guaranteed to it and that the injunction "unconstitutionally" denies it that "right." However, it is clear that impleader has never been elevated to such a constitutionally guaranteed status. As Professor Moore states:

"Impleader is permissive and not compulsory. An original party may, but is not obliged to implead a third party, and his failure to do so, or the court's refusal to

permit him to do so, affects none of his substantive rights." 3 MOORE'S FEDERAL PRACTICE ¶14.06 at 14-201 (1974).

Equally inaccurate is GAC's claim that it is denied some defense by this injunction. GAC argues that its "ultimate defense" is that if it is liable to a utility, then UNC is liable to GAC. Such may be GAC's ultimate theory of liability, but it is not a defense to actions brought by the utilities. It is no defense to a suit on a contract to assert that a third party has failed to supply goods to the defaulting supplier.

GAC has made this or substantially similar arguments to many courts and those courts have uniformly rejected the claims. In the state court action in which this injunction was issued, GAC claimed that the utilities were indispensable parties. That claim was rejected by both the trial court and the Supreme Court of New Mexico. In *General Atomic Company v. Duke Power Company*, No. C-C-76-173 (W.D.N.C.), the federal district court found that UNC was not an indispensable party to the arbitration between GAC and Duke. GAC was not denied any defenses by that court's action. In *Indiana & Michigan Electric Company v. GAC* No. 76 Civ. 881 (S.D.N.Y.), GAC moved to dismiss for lack of indispensable parties and the federal district court also rejected that claim. In the United States District Court for the District of New Mexico, GAC brought an action in interpleader seeking to have all the utilities and UNC involved in one action. That court found, in effect, that UNC and the utilities were not making a claim to a common fund or *res* and that the various contractual obligations and rights of UNC, GAC and the utilities were not so interdependent as to make interpleader proper.

In view of the repeated rulings by these courts, where trials on the merits and final judgments have not yet occurred, that it is not necessary to join the utilities in litigation with UNC, or vice versa, it is apparent that GAC is the only participant in any proceeding who does not understand the nature of third party practice. UNC, as a party to a supply agreement with GAC, is not an indispensable or necessary party to

GAC's litigation with any utility, nor are the procedural provisions of Rule 14 in the nature of a defense. Neither does the inability of GAC to implead UNC deprive GAC of any "rights."

GAC now argues that it is not attempting to subject UNC to vexatious, multiplicitous litigation, but is merely seeking a "unitary determination" of all relevant issues. These statements are at variance with the facts. What GAC is truly seeking is to force UNC into piecemealing its litigation with GAC into various suits around the country. There is absolutely no reason that UNC, seeking a resolution of a dispute with GAC over one contract, should be required to defend five or six different lawsuits to litigate, in each instance, only a portion of its dispute with GAC and involving many issues between GAC and the utilities which are not material to UNC's action.

We have asserted that GAC's statements and explanation of the legal and factual background which underlie this case are incomplete and inaccurate. We could not let them pass unchallenged but nevertheless recognize, and assert, that the writs of certiorari sought do not encompass these underlying issues and that they are not determinative of the issues to be decided here. Neither are GAC's motives for causing multiplicitous litigation at issue here. Those motives were established as "vexatious and harassing" by the trial court's finding.

As to GAC's assertion that it has been denied the right to defend, a review of the proceedings now pending is enlightening. In the state court action in which this injunction was issued, GAC has filed a counterclaim in the total sum of over two billion dollars.

GAC filed a complaint in interpleader in the United States District Court for the District of New Mexico which stated GAC's claims against UNC and the utilities. GAC is currently pursuing an appeal of the court's dismissal of that action.

One of GAC's constituent partners (Gulf) filed a declaratory judgment action against UNC in the United States District Court for the District of New Mexico which stated claims against UNC material to the Supply Agreement. This cause was dismissed because of the pending action in the New Mexico state court. Whether GAC will appeal is not known. GAC has filed a motion to intervene in a suit now pending between I&M and UNC in the United States District Court for the District of New Mexico. Proceedings in this action are stayed. GAC cannot seriously contend in the face of three federal actions and one state action that it has been denied any opportunity to make claims against UNC.

GAC, by this injunction, has been prevented from instituting vexatious and harassing litigation in its efforts to piecemeal the determination of the validity of the UNC-GAC Supply Agreement. GAC can raise any claim or defense against any utility or UNC in actions now pending. It should not now be heard to complain that it is enjoined from abusing the judicial system. Likewise, the utilities, if they feel they have a claim against UNC, are free to advance them in any forum. Nothing in the Constitution or in notions of federal supremacy prevents a state court from preventing a party subject to its jurisdiction from abusing the right of access to the courts.

Conclusion

Based upon the foregoing, we respectfully submit that the Petition for Writs of Certiorari should be denied.

HARRY L. BIGBEE
DONNAN STEPHENSON
MICHAEL R. COMEAU
LARRY D. MALDEGEN
W. PERRY PEARCE
142 West Palace Avenue
P. O. Box 669
Santa Fe, New Mexico 87501

Attorneys for Respondent

Of Counsel:

BIGBEE, STEPHENSON, CARPENTER & CROUT
142 West Palace Avenue
Post Office Box 669
Santa Fe, New Mexico 87501

October 15, 1976

APPENDICES

APPENDIX I

A-1

Order of The Supreme Court of New Mexico

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

Wednesday, June 16, 1976

No. 10870

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

HON. EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

This matter coming on for consideration by the Court upon petition for alternative writ of prohibition or alternative writ of superintending control, and the Court having issued said Writ and having heard oral argument and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED by the Court that the alternative writ heretofore issued in the above entitled cause on the 14th day of April, 1976, be and the same is hereby quashed as having been improvidently issued.

Attest: A true Copy
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

Excerpts from tape recording of hearing on June 16, 1976, in Santa Fe, New Mexico, before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the court.

* * * * *

JUSTICE MONTOYA: Now that bothers me insofar as the writ of prohibition is concerned, whether prohibition is a proper remedy under the circumstances here. The judges are already asking of me, "How can we prohibit it now?"

MR. ROBB: Well, I think from a technical standpoint the question of prohibition or whether the court acts under a superintending writ of control, I think probably it more largely follows in that latter category, Mr. Justice.

JUSTICE MONTOYA: It couldn't follow under the writ of prohibition.

MR. ROBB: Yes, I think there is a problem with prohibition because what we are saying here is — we are not saying the court lacks jurisdiction to do this, we are saying it shouldn't have done it, that it was improper for it to have done so.

JUSTICE MONTOYA: Isn't the proper remedy then appeal?

* * * * *

MR. BIGBEE: Coming again now to the next question. I think — they say they didn't appeal these injunctions because Judge Felter didn't certify them. They forget to say they didn't ask him to. You've got the record in the other appeal already before you. And, again, they never do anything just once. Like when we filed our first suit, they don't file just one case against us, they file two. So when they decide to go to the appellate procedure, we don't have one proceeding, we have two. There's an appeal where every one of these questions could have been certified by Judge Felter.

Excerpts from tape recording of hearing on June 16, 1976, in Santa Fe, New Mexico, before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the court.

* * * * *

They asked for one. I said no objection. They didn't ask for these others. They say that probably they wouldn't have been entitled to an interlocutory appeal and they say this in their reply brief. Why? Because it would not expedite the determination of the merits. That what on earth are we doing here by prohibition? I've got two things going. Now let's get to the merits of this case to see about this party situation. It's [inaudible]. It should be by appeal. It's terrible. We had to put these three volumes together and we still didn't get you the complete record in the short time. Because this is a matter that Judge Felter is entitled to have his record before you when it says he erred. But we tried to get enough in here.

* * * * *

MR. BIGBEE (Continuing): We respectfully submit they should have proceeded by appeal in every phase here. It is ridiculous to be before this Court with two large voluminous records; probably neither are quite as complete as they should be. We had to duplicate most of it. There was no reluctance; if they could have asked for a certification and been turned down, they could have said so. But Judge Felter was perfectly willing to let them certify any of these preliminary questions and the record shows we made no objection. And we're up here on a record that it's hard for this Court to make heads or tails of, and we're to have another one. But they always do it in twos, Your Honors.

* * * * *

APPENDIX II

A-4

Excerpts from transcript of hearing on September 8, 1976, in New York, New York, before Hon. Marvin E. Frankel, United States District Judge for the Southern District of New York, in the case of Indiana & Michigan Electric Co. v. Gulf Oil Corp., et al., 76 Civ. 881 (MEF)

* * * * *

MR. HUPPER (Representing General Atomic and Gulf Oil Corporation): Your Honor, if I may before I leave that point I am not making any suggestion at all that Justice Stephenson was sitting on the Supreme Court of New Mexico at the time some of the proceedings were before that court, or had anything to do with that proceedings. I am not suggesting that he acted in any way improperly while was on the court.

* * * * *

MR. HUPPER (continuing): I say that with the greatest of respect for the New Mexico state court system and in particular for Judge Felter.

APPENDIX III

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDIANA & MICHIGAN ELECTRIC COMPANY, *Plaintiff,*		76 Civ. 881 (MEF)
—against—		
GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., co-partners doing business under the name and style of General Atomic Company, and GULF OIL CORPORATION, individually, *Defendants.*		

FRANKEL, D. J.

Invoking "the pragmatic dictates of Rule 19(b), Fed. R. Civ. P.", *Federal Resources Corp. v. Shoni Uranium Corp.*, 408 F.2d 875, 876 (10th Cir. 1969), and citing the source of the quoted phrase as prime authority, defendant moves to dismiss the complaint for failure to join an assertedly indispensable party. The motion has been ably briefed and argued on both sides. The court concludes that dismissal is not warranted.

1. Defendant says "[t]he first test in 19(a) is * * * clearly met." The court disagrees. Whether defendant wins or loses, a complete and final decision here does not "require" in any pertinent sense further litigation with UNC. Of course, should defendant lose and be required to perform, it will have a substantial interest in seeking performance from UNC. However, such an interest does not constitute *legal* necessity, only the economic necessity a vendor may always have to obtain from its own suppliers what they have assertedly promised.

2. Plaintiff's analogy to the standard supplier situation is the apt one. The issues between UNC and GAC are substantially different from the ones here. There is, to be sure, a possibility of inconsistent adjudications. But that is an unlikely prospect, insufficient to overcome the right of plaintiff to seek enforcement here of defendant's asserted obligations. Defendant's [sic] Reply Memorandum highlights the distinct and separable nature of the controversies among the parties when it says (p. 17):

> "The central substantive issue in this case is whether GAC must provide uranium to I&M under the I&M-UNC Contract. The central issue as between GAC and UNC is whether under the agreement between them [to which I&M is not a party, upon which the rights of I&M are in no way dependent, and which has generated an array of issues having no connection with I&M] UNC must provide GAC with the uranium it needs to perform its obligations under the I&M-UNC Contract."

3. The pertinent authorities, which need not be retailed again, favor plaintiff. While the Tenth Circuit decision in *Federal Resources, supra,* squints favorably toward defendant, it is distinguishable. The court in that case was moved by a concern, *inter alia,* for the interests of the absent party. See 408 F.2d at 878. As defendant notes, no comparable concern arises here. In addition, the Tenth Circuit treated as significant the ready and suitable state forum in which the absent party could be conveniently joined. Id. at 877. Here, while defendant has referred to "one or more forums in New Mexico where under present circumstances the present controversy could more appropriately be litigated* * *," it failed to mention that it has actually been resisting the assertion of jurisdiction over it in New Mexico. In such a context, it is not appealing to assure plaintiff that the instant case, "could more appropriately be litigated" in New Mexico.

5. Defendant's desire for unitary adjudication could be realized by defendant's taking the initiative and bringing an action against UNC and I&M in a New Mexico court where

jurisdiction over all the parties could be obtained. Absent such an initiative by movant, the court is not disposed to dismiss plaintiff's case and force it to try to litigate in a forum not of its own chosing [sic].

In all the circumstances, the court concludes that "in equity and good conscience the action should proceed", Rule 19(b), between the present parties. The motion to dismiss is denied.

It is so ordered.

Dated: New York, New York
September 9, 1976

/s/ MARVIN E. FRANKEL
U. S. D. J.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-76-173

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Plaintiff,

—*vs*—

DUKE POWER COMPANY, a corporation,

Defendant.

ORDER

General Atomic Company, plaintiff, is a partnership composed of Gulf Oil Corporation, an oil company, and Scallop Nuclear, Inc. It styles itself on its stationery as "A Gulf and Royal Dutch Shell Company." General Atomic brought this action to obtain a declaration of rights under its November 7, 1973, contract by which it agreed to supply uranium to the defendant, Duke Power Company; it also moved for a stay of arbitration pending the conclusion of this action. Duke moved for a stay of this action pending arbitration. A hearing was conducted on Friday, August 13, 1976, on pending matters.

Duke, like other electric power companies, generates electric power, in part from the energy of falling water, but in the main by steam turbines. Most of the heat to produce the steam that turns the turbines comes from coal, but in recent years some of the heat is generated by nuclear reaction. Uranium, in one or more of its forms, is a fuel now us
some plants to generate such heat.

United Nuclear Corporation was a producer of uranium.

In 1970, United Nuclear made a contract with Duke Power Company to supply Duke with about six million pounds of uranium fuel in the years from 1971 to 1985, at prices to be computed on a somewhat sliding scale, but essentially in the neighborhood of $8.00 to $10.00 per pound. Deliveries were made under that agreement.

In June, 1971, Gulf and United Nuclear formed a new corporation, Gulf United Nuclear Fuels Corporation (GUNF). Gulf owned 57% and United Nuclear owned 43% of the GUNF stock. United Nuclear assigned the Duke uranium supply contract to GUNF, and Duke consented to the assignment only on condition that both Gulf Oil Corporation and United Nuclear guarantee that GUNF would perform its contract obligations. They did so guarantee.

In September, 1973, Gulf Oil broke up its joint venture with United Nuclear, bought out United Nuclear's interest in GUNF, and made a contract with United Nuclear (dated June 30, 1973) to purchase uranium from United Nuclear.

In November, 1973, Duke entered into the contract with GUNF for the purchase of uranium fuel out of which this dispute arises; this contract replaced the original 1970 contract with United Nuclear.

Immediately thereafter, Gulf Oil merged GUNF into Gulf as a division of Gulf and on January 1, 1974, assigned the Duke contract to General Atomic Company, the "Gulf Oil and Royal Dutch Shell Company" which is the plaintiff in this suit.

The contract contains an arbitration agreement apparently enforceable under North Carolina law and enforceable in this court.

United Nuclear Corporation was left with no direct duties to Duke, though it had been required by Duke to guarantee,

and did guarantee, the obligations of General Atomic and Gulf to Duke under the uranium supply contract.

General Atomic Company made deliveries until the end of 1975, but on December 30, 1975, it defaulted and failed to deliver 325,000 pounds of uranium.

General Atomic contends that it is excused from performance of its agreement with Duke because (and to the extent that) United Nuclear Corporation has failed or may fail to deliver fuel to General Atomic.

Apparently the open market price has gone up from $8.00 or $9.00 a pound to $39.00 or $40.00 a pound. Duke has incurred losses already estimated at about $11,500,000.00 because it has already had to buy on the open market 325,000 pounds of uranium fuel at approximately $39.00 a pound which plaintiff had contracted to deliver for $9.00 a pound.

Duke's losses will amount to about $180,000,000 if plaintiff succeeds in its contentions and if the price of uranium remains at its present level.

Plaintiff claims that the arbitration agreement is not enforceable and that arbitration has not been properly requested. Plaintiff claims that it should be excused from performance because it contends that it was contemplated that United Nuclear Corporation would be the sole source of supply for its deliveries. It also suggests, if arbitration is to be allowed, that United Nuclear Corporation be made a party to the arbitration.

I find the arbitration agreement to be enforceable; and the defects in the call for arbitration to date, if any exist, are remediable.

Since both parties are seeking equitable relief, some minimal attention should be given to their probable chances of success on the merits.

General Atomic's claim that its deliveries of uranium were

to be made only from fuel supplied by United Nuclear Corporation does not appear to be supported by the present record.

No portion of the contract supporting that claim has been called to the attention of the court.

In fact, the contract (Article XXX-D.) seems to point expressly in the opposite direction:

> "D. *Gulf United may enter into subcontracts and purchase agreements with others in the performance of this Agreement.* No contractual or employer-employee relationship between Purchaser and any such Gulf United subcontractor shall be created by virtue of this Agreement." (Emphasis added.)

The plaintiff's essential contract is (page 1) to *"supply"* fuel assemblies. In the face of the express provisions of Article XXX, and in the absence of contract provisions limiting plaintiff's sources to the original contracting supplier, United Nuclear Corporation, it would appear that the plaintiff has an uphill battle to persuade a trier of fact that it should be excused from performance simply because United Nuclear, one source of supply, has stopped making deliveries. Unless such persuasive evidence is developed, it appears that Gulf, a big operator in oil, has speculated big and lost big in uranium.

Such considerations are for the arbitrator and are relevant here only as they bear upon decision of the equitable questions before the court.

As to the request for a delay because United Nuclear Corporation is not a party defendant, two points should be noted:

> (a) United Nuclear, as a guarantor only of the 1973 contract in suit, would not be an improper party, but it is certainly not a necessary party to a determination of the rights of General Atomic and Duke under the arbitration agreement.

(b) A state court in New Mexico has entered an order, binding upon General Atomic, the plaintiff herein, enjoining plaintiff from litigating in any other court, or arbitrating, its claims against United Nuclear pending decision by the New Mexico state court. Despite that court order, General Atomic suggests that the court should bring United Nuclear into the arbitration proceedings on its own motion, and in any event should not permit arbitration of Duke's claim until United Nuclear has been brought into the arbitration proceedings. The one would be a violation of the letter and the other the spirit of the New Mexico court order. Moreover, I am unwilling to accept the suggestion that the New Mexico courts will not give General Atomic a fair hearing because United Nuclear, apparently a publicly held corporation, digs uranium in New Mexico. This court must and will proceed upon the premise that the New Mexico court will decide the case on its merits without regard to where the uranium is dug.

IT IS THEREFORE ORDERED:

1. That the plaintiff's motion to stay arbitration is denied.

2. That defendant's motion to stay this action and all proceedings herein until an arbitration shall have been had in accordance with the terms of the Agreement between the parties is allowed.

This 9 day of September, 1976.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

Supreme Court, U. S.
FILED
OCT 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1976

No. 76-385

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, N. Y. 10005

JOHN D. ROBB,
20 First Plaza,
Albuquerque, New Mexico 87103

DANIEL K. MAYERS,
ROBERT B. MCCAW,
1666 K Street, N.W.,
Washington, D. C. 20006
Attorneys for Petitioner

Of Counsel:
CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.,
20 First Plaza,
Albuquerque, New Mexico 87103

WILMER, CUTLER & PICKERING,
1666 K Street, N.W.
Washington, D. C. 20006

October 26, 1976

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Statement

Respondent UNC's Brief in Opposition ("Opposition") contains many material misstatements and distortions, necessitating this Reply.

Argument

Jurisdiction

UNC asserts that this Court lacks jurisdiction because the New Mexico Supreme Court may have rested its order on an alternative "independent non-federal ground" (Opposition, p. 3). Specifically, UNC argues that the New Mexico Supreme Court may not have reached GAC's claim that state courts lack power under the Constitution to enjoin federal court proceedings because it may have decided that under New Mexico procedure a writ of prohibition was inappropriate and that GAC had to seek redress through an interlocutory appeal (Opposition, pp. 3-5).

This argument is frivolous.

1. The total answer to UNC's argument is that its alleged alternative ground for the decision is neither "independent" nor "non-federal". UNC correctly stated New Mexico law in its Brief to the New Mexico Supreme Court when it conceded that (p. 8) "the purpose of prohibition is . . . to prevent a court from acting where it has no jurisdiction or is acting in excess of the jurisdiction it does have. . . ." *

Therefore, had the New Mexico Supreme Court decided, as UNC suggests, that prohibition was not the proper procedure, it necessarily would have found that the trial court did have jurisdiction to enjoin federal court proceedings—and thus would have decided the precise federal question now raised by GAC.

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* Brief of UNC in the Supreme Court of New Mexico, dated May 26, 1976 ("UNC Supreme Court Brief"). A copy of that Brief has been lodged with the Clerk of this Court, and the excerpts cited in this Reply appear in Appendix A annexed hereto. *See also State* v. *District Court of McKinley County*, 41 N.M. 658, 73 P.2d 333 (1937); *Hammond* v. *District Court*, 30 N.M. 130, 228 P. 758 (1924); *State ex rel. Harvey* v. *Medler*, 19 N.M. 252, 142 P. 376 (1914).

2. UNC is well aware of the fallacy in its argument. UNC never contended below that prohibition was not the proper procedure for review of the injunction in so far as it ran against federal court procedings. In its brief it merely argued that prohibition was not the proper procedure *to review the injunction in so far as it ran against state court and arbitration proceedings or to review Judge Felter's refusal to dismiss for failure to join indispensable parties under Rule 19.* UNC counsel, at the hearing before the New Mexico Supreme Court, did not depart from the positions taken in its brief.*

The excerpt from the hearing before the New Mexico Supreme Court relied upon by UNC (Opposition, p. A-2) in which Justice Montoya questioned the propriety of prohibition inexplicably omits the introductory statement of GAC counsel (Mr. Robb) which clearly shows that the ensuing colloquy cited by UNC related only to the injunction against state court and arbitration proceedings and

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* UNC stated in its UNC Supreme Court Brief, pp. 7-9:

"Insofar as the injunction runs against *state court litigation and arbitration proceedings,* General Atomic is seeking review of the merits of the injunction. This is not the function of prohibition.

". . . .

"Thus, we see that General Atomic is attempting to obtain a review on the merits of *that portion* of the injunction which is directed toward *state litigation and arbitration proceedings. That kind of review* is not the function of prohibition." (Emphasis added.)

Section 1 of the UNC Supreme Court Brief entitled, "THE DISTRICT COURT HAD *JURISDICTION* TO ENJOIN GENERAL ATOMIC FROM INSTITUTING ACTIONS IN *FEDERAL COURT*" (emphasis added), dealing with the injunction against federal proceedings, raises no question whatsoever as to the propriety of prohibition. *See also* paragraph 12 of UNC's Response to Alternative Writ, dated April 30, 1976, excerpted in Appendix B annexed hereto. A copy of that Response has been lodged with the Clerk of this Court.

to the Rule 19 decision. That introductory statement is set forth in Appendix C hereto.*

Thus neither the parties nor the New Mexico Supreme Court ever raised or considered the alleged "ground" now suggested by UNC.**

3. In any case, it also is clear that no appeal lay under the New Mexico interlocutory appeal statute, § 21-10-3, N.M.S.A. 1953 (Supp. 1975), to review the propriety of an injunction collateral to the merits of the New Mexico lawsuit and affecting GAC's right to proceed in federal courts. As UNC concedes (Opposition, p. 4), the New Mexico statute was enacted as an analogue to 28 U.S.C.

* GAC's argument at the hearing was divided between Mr. Eastham, who spoke first on the lack of power of the Santa Fe Court to enjoin federal proceedings (Appendix to Petition, p. 15a), and Mr. Robb, who then addressed the other questions. *See* Appendix C hereto.

** UNC's argument (Opposition, p. 5) that GAC is estopped to challenge the Injunction because GAC invoked the Santa Fe Court's jurisdiction by itself seeking an injunction and that the New Mexico Supreme Court could have rested its decision on that ground is even more frivolous. GAC at all times maintained that the court lacked jurisdiction to enjoin federal court proceedings. The portion of the record relied upon by UNC to show that GAC sought to have the injunction apply equally to UNC shows nothing of the kind. To the contrary, it shows that GAC *objected to the injunction proposed by UNC* on the ground, among others, that it was unfair to restrict GAC in a way that UNC was not restricted. Judge Felter, "without making any ruling on [GAC's] position", responded to this *objection to any injunction at all* by making the injunction run equally against both parties. *See* the pertinent excerpt from the hearing before Judge Felter annexed hereto as Appendix D.

Indeed, had the New Mexico Supreme Court held that GAC's actions in effect conferred jurisdiction on the Santa Fe Court to enjoin federal proceedings, such a ruling would itself raise the same federal question involved here, since litigants cannot invest a court with jurisdiction exceeding the constitutional limits of its power. *See American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1950).

§ 1292(b). *See* Note, *New Mexico's Analogue to 28 U.S.C. § 1292(b): Interlocutory Appeals Come to the State Courts*, 2 New Mexico L. Rev. 113 (1972). § 1292(b) was obviously never intended to apply to injunctions, which in federal practice are appealable as of right.* Moreover, an interlocutory appeal under either § 21-10-3 or § 1292(b) is proper only where it involves a "controlling" question of law, resolution of which may "materially advance the ultimate termination of the litigation". Since appellate review of the Injunction could neither affect the outcome nor materially advance the termination of the Santa Fe litigation, an interlocutory appeal obviously was unavailable** and a writ of prohibition was the proper procedure.

We emphasize in conclusion that the Opposition does not dispute that the questions presented by this Petition are wholly separate from and independent of the merits of the state court action in which the Injunction was issued, and that review of a final judgment in that action would not provide an opportunity for petitioner to obtain review of the Injunction. The Injunction is thus clearly a "final judgment or decree" within the meaning of 28 U.S.C. § 1257 (Petition, p. 5).

GAC's Alleged "Harassment" of UNC

The Opposition attempts to portray UNC as a small and struggling local business, fighting for its very existence against the massive power of defendants allegedly seeking

* New Mexico has no analogue to 28 U.S.C. § 1292(a), permitting immediate appeals from injunctive orders, thus leaving prohibition as the proper procedure for review of an injunction such as this.

** *See, e.g., United States* v. *Woodbury*, 263 F.2d 784 (9th Cir. 1959); *United States* v. *International Business Machines Corp.*, 406 F. Supp. 184 (S.D.N.Y. 1975); *McKillop* v. *Regents of Univ. of Calif.*, 386 F. Supp. 1270 (N.D. Cal. 1975); *Lemelson* v. *Ampex Corp.*, 372 F. Supp. 708, 715 (W.D. Illinois 1974); *Chas. Pfizer & Co.* v. *Laboratori Pro-Ter Prodotti Therapeutici*, 278 F. Supp. 148, 154 (S.D.N.Y. 1967).

to destroy it by "piecemealing" and "vexatious" litigation against it throughout the country (*e.g.*, Opposition, pp. 21-22). However appealing this argument might be to a jury, it is utterly inconsistent with the facts.

First, UNC may not be Gulf or Royal Dutch Shell, but it is a substantial, thriving organization, which has, indeed, harbored ambitious plans to rival General Electric, Westinghouse, Babcock & Wilcox, and Combustion Engineering in the business of manufacturing reload fuel assemblies for nuclear reactors (Opposition, p. 7). A Delaware corporation headquartered in New York and with offices and plants in ten states, UNC is, in the words of its 1976 Annual Report

> "... [t]he nation's largest independent producer of uranium ... [and] ranks approximately third among all U.S. companies in terms of uranium production capability and reserves. In addition to its expanding uranium exploration, mining and milling operations, the company mines low sulphur steam coal and produces some oil and natural gas." 1976 Annual Report, p. 1.*

Also according to its 1976 Annual Report, UNC has uranium reserves of 86,900,000 pounds (having a present market value of well over three billion dollars) (pp. 2, 6). Its 1976 reported revenues were over $105,000,000 and its net earnings over $8,000,000 (p. 3). A publicly-held company with over 17,000 stockholders (p. 2), its stock is traded on the New York Stock Exchange and other major exchanges.

Secondly, it bears emphasis that it was *UNC* that entered into each of the several utility contracts now the subject

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* A copy of UNC's 1976 Annual Report has been lodged with the Clerk of this Court.

of allegedly "vexatious" litigation from which UNC successfully sought protection in the local New Mexico court. Even the Opposition concedes (Opposition, p. 7) that UNC itself executed contracts with both I&M and Commonwealth Edison and "letters of intent" with Detroit Edison and Duke Power. Having deliberately embarked on this ambitious commercial enterprise, involving hundreds of millions of dollars in sales, with utility customers scattered around the United States, it is not unfair to UNC for GAC to seek UNC's participation in disputes with the utilities as to the extent of GAC's and UNC's obligations to supply uranium under the utility contracts and the 1973 Uranium Supply Agreement. It is particularly fair to require UNC's participation since (a) UNC remains directly liable to the utilities on three of the five contracts to supply the uranium required to perform those contracts (although this is ignored by the Opposition) and (b) under the 1973 Uranium Supply Agreement, UNC's obligations to supply uranium to GAC are for the most part defined in terms of GAC's obligations to supply uranium under the utility contracts. (*See* Petition, p. 8).

Third, it is a gross distortion to allege that GAC or its constituent partners "pursued a plan of piecemeal litigation on a coast-to-coast basis" against UNC (Opposition, p. 21). *Viz:*

> (a) GAC brought a statutory interpleader action *in the Federal District Court for New Mexico* seeking an overall single forum for consistent adjudication among it, UNC and all the utilities. Such consistent adjudication was not to UNC's liking, or that of the utilities, and the case was dismissed at their urging for lack of subject matter jurisdiction (Petition, p. 10).

(b) Gulf sued UNC *in the Federal District Court for New Mexico* seeking declaratory relief as to the effectiveness of a release given Gulf by UNC, but only after UNC, in a removed action which it voluntarily dismissed in that same federal court, had challenged that release (Petition, p. 9).

(c) GAC did *not* sue UNC in its suit against Commonwealth Edison in the Illinois state court seeking termination of the Commonwealth Edison contract pursuant to a cancellation provision (Opposition, p. 13).

(d) The only lawsuits outside of New Mexico in which GAC has expressed an intention to join UNC are those in which GAC was the unwilling defendant in an action by a utility (*i.e.*, Duke Power and I&M). Where GAC is sued by a utility seeking performance of a contract originally made with UNC and where UNC's obligation to supply uranium to GAC under the 1973 Uranium Supply Agreement is largely measured by GAC's duty to furnish such uranium in performance of the utility contract, GAC has taken the position that it is entitled to join UNC in the utility litigation in order to avoid being whipsawed between the utility in one forum and UNC in another. This is precisely why GAC wishes to join UNC in the I&M litigation against GAC in the New York federal court.

UNC's contentions of intentional "piecemealing" and "vexatious" litigation by GAC against UNC are sham.*

* It is UNC itself that practices the art of "piecemealing" when that suits its purposes. For example, UNC first initiated litigation concerning these disputes when it sued GAC in one New Mexico state court and I&M in another, although the underlying issues in each case are substantially similar and joinder of both in a single case was clearly indicated. UNC has successfully kept these disputes "piecemealed" in separate courts (Petition, pp. 10-11).

UNC's claim that litigation between GAC and the utilities are "in forums in which [UNC] has no interest, over issues which do not concern [UNC], with parties with whom [UNC] has no quarrel" (Opposition, p. 25) likewise is a sham. On September 9, 1976, GAC sought to intervene in UNC's separate litigation against I&M in the federal court in Albuquerque (Petition, pp. 10-11). In resisting such intervention, UNC's counsel affirmatively asserted, when it suited his purpose, that I&M's suit against GAC in the New York federal court "involves the same dispute" as *UNC v. I&M*, a position flatly inconsistent with UNC's position before this Court that the issues "do not concern" UNC and that I&M is a party with whom UNC "has no quarrel". *See* Letter dated October 15, 1976, from Harry L. Bigbee, Esq., to The Honorable Edwin L. Mechem, United States District Judge for the District of New Mexico. *See* Appendix E hereto.

And in any event, the federal courts have ample power—by way of stay, transfer, coordinated discovery, and appropriate sanctions—to deal with genuine problems of vexatious, "piecemeal" and harassing litigation, if UNC could demonstrate that such problems exist.

Alleged Lack of Need for GAC to Join UNC in the Utility Litigation

The Opposition (*e.g.*, pp. 16, 17, 36) belittles GAC's position that UNC's refusal to perform is a defense or that GAC has a valid right of impleader against UNC in the utility actions against GAC. UNC even suggests that "many courts" have "uniformly rejected" GAC's claims. All of this too is completely untrue.

It is not true, as the Opposition states (p. 26) that "[i]t is no defense to a suit on a contract to assert that a third party has failed to supply goods to the defaulting supplier". Such a defense of course exists under an appropriate *force majeure* clause and even absent such a clause, a supplier such as GAC may have a commercial impracticability defense under Section 2-615 of the Uniform Commercial Code where the agreed upon or assumed source of supply refuses

to deliver.* Here the understood source of the uranium for performance of the UNC-I&M Contract was UNC. Indeed, UNC concedes (Opposition, p. 16) that certain of its uranium ore reserves were specifically dedicated to performance of that contract.

Even more importantly, the 1973 UNC Uranium Supply Agreement specifically provides that UNC shall sell to GAC certain uranium which GAC "is required to supply pursuant to the [UNC-I&M Contract] . . . in accordance with the terms and conditions, including price, of [that Contract] . . ." (Petition, p. 8). In short, UNC has agreed in substance to indemnify GAC in respect of its obligations to supply uranium to I&M. This is a classic case of impleader to ensure, as Professor Moore puts it, that there will be obtained "consistent results from identical or similar evidence". 3 Moore, Federal Practice ¶ 14.04 at 14-189 (1974). UNC, of course, wants to stay out of the *I&M* v. *GAC* litigation in the hopes of convincing the Santa Fe Court (no matter what the court in *I&M* v. *GAC* may hold to the contrary) that GAC was not "required" to supply uranium under the terms of the UNC-I&M Contract.

Not a single court has held that UNC's refusal to perform does not excuse GAC's nonperformance. Not a single court has held that GAC does not have the right to implead UNC in order fully to protect itself in the utility actions against GAC. All that the courts have so far held (we think mistakenly) is that a *utility* may litigate against GAC alone and the *utility* is not compelled to join UNC as an indispensable party.

The provisions of the Federal Rules providing for impleader and permissive joinder are designed to permit

* GAC contends that the *force majeure* clauses in the contracts with the utilities excuse it from performance by reason of UNC's failure to perform. GAC also has raised the commercial impracticability defense in its litigation with the utilities.

efficient and consistent resolution of common issues arising from the same transactions or occurrences. 3 Moore, Federal Practice ¶ 14.04 at 14-189 (1974); 3A Moore, Federal Practice ¶ 20.12 at 2721 (1974). No court has held that GAC is not entitled to avail itself of the benefit of those provisions. The only ruling preventing GAC from impleading or joining UNC as a defendant is the Injunction at issue here.

Finally, it is clear that the Injunction, by depriving GAC of the use of those provisions of the Federal Rules designed to promote the resolution of common controversies in a single forum, will increase rather than decrease the burden of litigation in federal courts. The result will indeed be "piecemeal"and quite possibly inconsistent adjudications, waste of time and effort of parties and courts alike in duplicative discovery and trials and, at the end, increased likelihood of appeals from and collateral attacks on whatever judgments may be reached.

The Mandate of Donovan

UNC attempts to circumvent this Court's holding in *Donovan* in two ways. First, UNC repeatedly recites GAC's alleged "vexatious" and "harassing" litigation against UNC as a ground for the Injunction. The flaw in this approach (aside from its inconsistency with the facts, as demonstrated above) is that it is irrelevant. UNC seems to assume that the dissent in *Donovan,* not the majority decision, was the opinion of this Court. In fact, unlike the instant case, *Donovan* presented an extremely sympathetic case for permitting a state court to enjoin the institution of harassing federal proceedings. *See* Note, *State Injunction of Proceedings in Federal Courts,* 75 Yale L. J. 150, 158 (1965). Yet this Court squarely rejected all contentions of

harassment as irrelevant under the Supremacy Clause. That concept of federal supremacy, deeply rooted in our organic law, should be reaffirmed here.

Second, the Opposition (p. 22) would construe *Donovan* as applying only to the "prosecution" of a federal action previously commenced but not to the "institution" of a new federal lawsuit.* This verbal quibble (though fallacious)** also is irrelevant. The holding of *Donovan* directly applies to institution of a new federal lawsuit. The fact is that Mr. Donovan went to jail for contempt solely because he *instituted a federal action after he had been enjoined* from doing so by the state court (Petition, p. 18). The parallel between this case and *Donovan* is exact.

Conclusion

The Injunction issued by the Santa Fe Court will not reduce or prevent litigation in the federal courts. To the contrary, by interfering with GAC's right to invoke the protections of the Federal Rules of Civil Procedure to the same extent as any other defendant in a federal civil case, the Injunction can only add to the burden of the federal

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* The Opposition (p. 24) attempts to distinguish *Donovan* by attributing to Mr. Justice Black in *Donovan* the statement that an injunction would be appropriate where "jurisdiction has not yet attached". The quoted language does not appear anywhere in Mr. Justice Black's majority opinion.

** In fact, the term prosecution "includes every step in action, from its commencement to its final determination", *Black's Law Dictionary, Revised,* 4th ed. 1385 (West Publishing Company, 1968). It means the "institution and carrying on of a suit or proceeding . . .", *Webster's Third New International Dictionary* 1820 (Unabridged) (G. & C. Merriam Company, 1961). The term "clearly imports a beginning and an end", *Bradley* v. *United States,* 410 U.S. 605, 609 (1973).

courts. It will increase the likelihood of piecemeal litigation, complex motion practice and inconsistent judgments and multiply the possibility of appeals, remands and retrials. For this reason and for the other reasons stated above and in the Petition, GAC's Petition should be granted.

Respectfully submitted,

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, N. Y. 10005

JOHN D. ROBB,
20 First Place,
Albuquerque, New Mexico 87103

DANIEL K. MAYERS,
ROBERT B. MCCAW,
1666 K Street, N.W.,
Washington, D. C. 20006

Attorneys for Petitioner

Of Counsel:

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.,
20 First Plaza,
Albuquerque, New Mexico 87103

WILMER, CUTLER & PICKERING,
1666 K Street, N.W.,
Washington, D. C. 20006

October 26, 1976

APPENDIX A

Excerpts from Brief of Real Party in Interest, United Nuclear Corporation, in *General Atomic Company, etc.* v. *The Honorable Edwin L. Felter, etc.* in the Supreme Court of the State of New Mexico, dated May 26, 1976 ("UNC Supreme Court Brief").

P. 1

POINT I

THE DISTRICT COURT HAD JURISDICTION TO ENJOIN GENERAL ATOMIC FROM INSTITUTING ACTIONS IN FEDERAL COURT.

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Pp. 7-9

Federal actions pending against United were not enjoined. The court acted within its jurisdiction in issuing the injunction and the alternative writ should be quashed.

POINT II

PROHIBITION OR SUPERVISORY CONTROL ARE NOT SUBSTITUTES FOR APPEAL AND CANNOT BE USED TO REVIEW THE CORRECTNESS OF THE TRIAL COURT'S DECISION.

• • •

Insofar as the injunction runs against state court litigation and arbitration proceedings, General Atomic is seeking review of the merits of the injunction. This is not the function of prohibition.

The purpose of prohibition is *not* to restrain a lower court from making an erroneous decision or to correct an erroneous decision already made, but, instead, is used to prevent a court from acting where it has no jurisdiction or is acting in excess of the jurisdiction it does have. *State ex rel. Prince* v. *Coors,* 52 N.M. 189, 194 P.2d 678 (1948); *State ex rel. Harvey* v. *Medler,* 19 N.M. 252, 142 P. 376 (1914). There is no doubt that the District Court had

jurisdiction to enjoin the institution or prosecution of state litigation or arbitration proceedings. General Atomic questions only whether United made a sufficient showing of vexation and harassment to justify the issuance of the injunction. That question should not be considered within the context of prohibition.

State ex rel. Miller v. *Tackett,* 68 N.M. 318, 361 P.2d 724 (1961), was a prohibition proceeding where a workmen's compensation claimant sought to prohibit a district judge from requiring that the claimant execute a medical authorization releasing medical information to the employer's attorneys. This Court held that the doctor-patient privilege statute applied and that the trial court exceeded its jurisdiction in requiring the release of the information. Relevant to this prohibition action is the statement in *Tackett* that:

> "The situation differs from that which is present where the court is given power and authority to do certain acts upon proof of good cause or other proper showing provided for in the statute. *If there is a question as to whether good cause has been established, or proper showing made, prohibition is not the proper mode for raising the issue since the court having the power to make the order was acting within its jurisdiction, and errors or mistakes made by it are reviewable only on appeal or by writ or error.*" 361 P.2d at 728 (Emphasis added).

Thus, we see that General Atomic is attempting to obtain a review on the merits of that portion of the injunction which is directed toward state litigation and arbitration proceedings. That kind of review is not the function of prohibition.

APPENDIX B

Excerpt from UNC's Response to Alternative Writ of Prohibition or Alternative Writ of Superintending Control in *General Atomic Company, etc.* v. *The Honorable Edwin L. Felter, etc.*, in the Supreme Court of the State of New Mexico, dated April 30, 1976.

Paragraph 12

Prohibition or supervisory control may not be appropriate methods for testing the correctness of a Rule 19 decision. Petitioner's remedy may be by appeal and thus this action should be dismissed. This jurisdiction question is merely suggested to the Court as United desires a decision on the issues presented by the Petition.

APPENDIX C

Excerpts from tape recording of hearing on June 16, 1976, in Santa Fe, New Mexico, before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the Court.

Mr. Eastham: . . . We submit that this ruling of *Donovan* is clear. A state court cannot enjoin a person from bringing or conducting or concluding an in personam federal court action. The injunction issued by Judge Felter did exactly this. Accordingly, the writ of prohibition should remain permanent insofar as the injunction purports to prevent General Atomic and all the other persons and entities enjoined in that order from taking action of any kind in federal court. As I stated, my point does not depend on the facts. It goes to a whole question of power. Now Mr. Robb will go into the other aspects of this matter. Thank you.

Mr. Robb: Your Honors, with the permission of the Court, I have prepared some abstracts from the record that I'm going to be referring to which is easier, I think, than having to dig up the page numbers. They're all exhibits that are in the record. Your Honors, in my part of the argument I expect to address the two other major points: the validity of the injunction insofar as it pertains to state court action or arbitration, and number 2, the validity of the order of the court in denying the motion to join utilities in the Santa Fe action.

Justice Montoya: Now that bothers me insofar as the writ of prohibition is concerned, whether prohibition is a proper remedy under the circumstances here. The judges are already asking of me, "How can we prohibit it now?"

Mr. Robb: Well, I think from a technical standpoint the question of prohibition or whether the court acts under a superintending writ of control, I think probably it more

likely and more largely follows in that latter category, Mr. Justice. I think that the . . .

Justice Montoya: It couldn't follow under the writ of prohibition. I mean that's obvious.

Mr. Robb: Yes, I think there is a problem with prohibition because what we are saying here is—we are not saying the court lacks jurisdiction to do this, we are saying it shouldn't have done it, that it was improper for it to have done so, and I think prohibition more properly . . .

Justice Montoya: Isn't the proper remedy then appeal?

APPENDIX D

Excerpts from Transcript of Hearing Before The Honorable Edwin L. Felter in the District Court for the First Judicial District, Santa Fe County, New Mexico, on April 2, 1976.

Mr. Thompson: . . . We want to make sure and we have admitted [sic] language to this effect, that we are not foreclosed, because obviously the plaintiff would not be foreclosed from demanding arbitration in this action.

It is also our position with regard to arbitration, in other actions, that likewise, the plaintiff if it so desires could participate in arbitration which is imminent. In North Carolina, in the Duke Power controversy, that if the plaintiff so chose to enter that action, and demanded arbitration, it could do so. But the proposed form of the injunction purports to prevent us from doing the same thing, and we would submit, that would be unequal treatment and not contemplated by the motion for the injunction.

So, again, we would ask that we not be deprived of the right to demand arbitration, since that has as its purpose, the saving of judicial time and what have you, and we think it would be inappropriate to foreclose.

The Court: Does United Nuclear have any objections to the terms of the preliminary injunction applying equally to them as it does to the defendants?

Mr. Bigbee: We have no objections.

Mr. Thompson: We summarize by stating that we believe that we should not be foreclosed, in spite of what the plaintiff has stated at this point.

The Court: Without making any ruling on your position, it seems to me that both parties should be in the same position, one should not have the privileges that the other does not have.

I cannot see how any injunction against litigation could apply to the Defendants unless it applied equally to the Plaintiff.

APPENDIX E

Letter from Harry L. Bigbee, Esq., to The Honorable Edwin L. Mechem, United States District Judge, United States District Court for the District of New Mexico, dated October 15, 1976.

[LETTERHEAD OF BIGBEE, STEPHENSON, CARPENTER & CROUT]

October 15, 1976

The Honorable Edwin L. Mechem
United States District Judge
Federal Building
Post Office Box 97
Albuquerque, New Mexico 87103

Re: United Nuclear Corporation v. Indiana & Michigan Electric Company and American Electric Power Service Corporation, Civil No. 76-561.

Dear Judge Mechem:

We have received General Atomic's Motion for entry of an order permitting intervention, proposed Order and Memorandum in support thereof.

We are unable to comprehend the rationale of General Atomic's argument that they are entitled to intervene. It seems plain to us that since the action is stayed, there is nothing in which General Atomic can intervene and nothing for United Nuclear to respond to. The dire consequences predicted by GAC simply cannot occur so long as the action is stayed.

We would also point out that United Nuclear is already engaged in litigation with General Atomic in the District Court of Santa Fe County, No. 50827. In that case, General

Atomic is enjoined from subjecting United Nuclear to vexatious and harassing litigation. Also, GAC and I&M are already engaged in litigation with each other in the Southern District of New York, No. 76 Civ. 881 (MEF). This lawsuit involves the same dispute that is the subject of GAC's attempted intervention here.

Because of the existence of the ongoing actions, GAC has more than adequate redress in those forums for its claimed injuries. Thus, we do not propose to respond to General Atomic's Motion to Intervene or Motion for an Order allowing intervention, unless directed by the Court to do so.

If this procedure is not acceptable, will you please let us know.

Very truly yours,

s/ Harry L. Bigbee
HARRY L. BIGBEE

HLB:dl
cc: Mr. Rogers Doering
Mr. John D. Robb